82-1914

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. _____

EVELYN FALKOWSKI,

Petitioner

v.

BERTRAM N. PERRY,

Respondent

and

LOWELL W. PERRY, etc. *et al.*,
(Equal Employment Opportunity Commission),

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where failure of government to hear or insure initial legal defense to supervisor sued as an agency official contributed to her subordinate's prevailing, should resulting final judgment be vacated?

2. Should decisions tainted by unresolved conflicts of interest of counsel be vacated?

3. Do certain representations to Courts constitute fraud upon the Courts such that these Opinions ought to be vacated?

4. Does appellate nullification without publication, of falsely stigmatizing published decisions, deprive of due process?

5. Where District Court fee decisions find on the merits of untried cases, and record shows bias, should this Court vacate affirmance and order remand for decisions by an impartial tribunal?

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OPINIONS BELOW:

A Federal Court in the Northern District of Alabama departed from the usual course of judicial proceedings. It found, in a decision awarding fees, that a Federal employee was a "whistle blower" against Petitioner. Perry v. Golub, 25 EPD ¶31,488 (1981). Yet the Court had mooted, without trial, the employee's lawsuit, simultaneously denying as a sanction an agency petition to fire him. Perry v. Golub, 74 FRD 360 (1976). The public interest, as will be shown, warrants this Court's exercising its power of supervision.

Petitioner appeals the Eleventh Circuit decision on Perry v. Golub (App. A, 1a). Unpublished and noted "Affirmed in Part, 691 F.2d 510 (CA-11 1982), it left false stigma unrelieved. She appeals unpublished affirmance of Falkowski v. (Lowell) Perry (App. B, 82a). Decisions awarding attorney fees in both cases deny due process by resolving on the merits issues not before the Court.

She appeals a related decision by a different Court, Perry v. Falkowski (App. C, 122a), because it was constrained by vacated decisions in Perry v. Golub (A, 1a). This prevented record correction for Petitioner.

In earlier unpublished Opinion, April 25, 1979 (App. D, 133a) the Fifth Circuit ruled:

"The district court correctly dismissed these actions without prejudice on account of mootness. The effect of such dismissals was to vacate all underlying proceedings so as to spawn no consequences. The adjudication of mootness eliminated all pending controversies and left the court without jurisdiction to enter those portions of the injunction orders restricting future actions of the parties in either case. The orders of dismissal, without prejudice, are affirmed, but the protective orders" or injunctions are vacated. AFFIRMED AND VACATED." (Unpublished, and reported Perry v. Golub, 594 F.2d 861 and Falkowski v. Perry, 594 F.2d 862,"Affirmed and Vacated.")

The District Court departed from the foregoing law of the case when it assessed fees against the U. S. Equal Employment Opportunity Commission (EEOC) of $99,331.90 to Bertram Perry, by finding in Perry v. Golub, 25 EPD ¶31,488 (1980) that he prevailed in 1975 as a whistle blower against EEOC, for reporting his then supervisor, Petitioner, to a U. S. Attorney. In the fee award, the Court said:

"It has never been contended that the Court of Appeals' decisions had any arguable effect on this Court's 1975 decision..." [App. A, 15a, (referring to preliminary injunction based on "whistle blower" status), 400 F. Supp. 409)].

In further conflict with prevailing status under the law of the case, the Court assessed $943.90 against EEOC to Petitioner, because her authority, removed because of Bertram Perry's unsustained accusations, was restored. [Falkowski v. (Lowell) Perry, unpublished (App. B, 82a)].

Petitioner had to personally defend from two lawsuits by Perry and litigate to save her employment because of false accusations by him. Her time burden was at least triple that of Perry's counsel, since Perry was not sued.

[The government, which routinely defends others sued in official capacity, according to report from the Justice Department to the Committee on the Judiciary of the U. S. Senate (Excerpts, App. E, 129a), did not defend or even hear her on Perry's charges.

In contrast, Bertram Perry, throughout years of litigation, received free legal defense from a lawyer renowned (App. A, 68a) and known as a critic of EEOC "fishing expeditions" who defends employers charged before the Office where Perry works.

Documents called to the attention of Courts below, as well as unrefuted testimony, make manifest conduct by the "whistle blower," including deception

[purporting to report schizophrenic conduct by Petitioner, including claim that while confused and disassociated from reality, so that she believed Bertram Perry was her Regional Director, Robert Jeffrey, Petitioner threw paper at him (Perry). Bertram Perry concluded that the irrational purported conduct was because of Petitioner's intense jeolousy and hate of him (Ex. A, 52)].[1]

[1] The tale concocted by Perry came about as follows: Perry had insulted Petitioner, then his supervisor, in the presence of a house guest of Petitioner visiting in her office. The guest was shocked and wrote an account of Perry's behavior, but mistakenly referred to him as Mr. Jeffrey (whose name Petitioner had also mentioned as that of her supervisor). Perry sent a version of the incident to Mr. Jeffrey (who later told Petitioner Perry found the witness's statement in the copy machine).

Perry mixed a false tale of insane actions by Petitioner with false tales of stupid acts by her, throwing in a story to cause her supervisor to suspect that she was in forbidden communication with Commissioner Ethel Walsh.

Petitioner's counsel raised to the District Court the seriousness of Perry's report, and the implications of her supervisor's not investigating the report of alleged insanity.

The court thereafter published against Petitioner that she <u>threw paper at Perry</u> based on Jeffrey's proposed charge against her "documented" solely by that report (Ex A, 52) from Perry, who did not testify.

Also manifest in the record, in addition to testimonial proof, is documentary evidence of insubordination [for one example, see copy of letter from Perry to Petitioner, his supervisor, in record underlying Perry v. Golub, 464 FS 1016, 1978 (Ex. B, 64)].

Petitioner's side (Excerpt, Ex C, 72) is untold in Opinions.[2]

Fee Opinions violate due process and law pertaining to moot cases as will be shown.

JURISDICTION

On 25 October 1982 the Court of Appeals denied petitioner's appeals. (App. G, 137a). It denied a timely petition for rehearing on 26 January 1983 (App. F, 135a). Mr. Justice Powell granted enlargement of time through May 26, 1983. Jurisdiction of this

[2] EEOC proposed to fire Petitioner and Bertram Perry, in November 1977. The Court had dismissed their actions but retained jurisdiction. Petitioner filed answers to the proposed charges with the Court. She later referenced in her testimony her answers. Excerpts (Ex C, 74) include:
"...My predecessor also was forced to seek to remove Perry. My predecessor is Black, and I had successfully directed an integrated office, so Perry's charges of racism against me certainly would seem to be spurious...."

Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Where failure of government to hear or insure initial legal defense to supervisor sued as an agency official contributed to her subordinate's prevailing, should resulting final judgment be vacated?

2. Should decisions tainted by unresolved conflicts of interest of counsel be vacated?

3. Do certain representations to Courts constitute fraud upon the Courts such that these Opinions ought to be vacated?

4. Does appellate nullification without publication, of falsely stigmatizing published decisions, deprive of due process?

5. Where District Court fee decisions find on the merits of untried cases, and record shows bias, should this Court vacate affirmance and order remand for decisions by an impartial tribunal?

LAWS AND STATUTES INVOLVED

Fifth Amendment to Constitution: No person shall...be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

First Amendment to Constitution: Congress shall make no law ... abridging the freedom

of speech...or the right...to petition the Government for a redress of grievances.

Civil Rights Act of 1971, 42 USC 1985:

Conspiring to deprive of office or deter from testifying unlawful. (Text in App. H, 140a).

Title VII of the Civil Rights Act of 1964, as amended, 42 USC 2000e:

§704(a) It shall be an unlawful employment practice for an employer to discriminate ... because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. [As amended March 24, 1972, 42 USC §2000e3(a).]

§717(a) All personnel actions affecting employees or applicants for employment...in executive agencies...shall be made free from any discrimination based on race, color, religion, sex, or national origin. [As added March 24, 1972, 42 USC §2000e16(a).]

STATEMENT

1. Background:

Petitioner, a civil libertarian since youth, was among the first to openly oppose racial segregation in Alabama, years before the enactment of Title VII.

In 1958, she received threats on her life for answering a newspaper article which defended racial segregation. Her stand for "the Southern tradition of brotherhood," also earned her the epithet, "Nigger Loving Bitch," and a place in the files of the FBI in Birmingham.

In 1968, Petitioner began working for EEOC in Birmingham, followed six months later by Bertram Perry, first an admired colleague and then twice a litigant against her. Petitioner is white, Perry is black.

In April 1971, Petitioner opened EEOC's office in Mississippi, a location declined by five men before she requested it. After her one year commitment to that location, she unsuccessfully bid on openings in Birmingham, including at lower grades, to end 660 mile round trip flights each weekend to her husband and children.

In November 1973, she filed suit in Alabama against EEOC because of disparate treatment, including her inability to transfer back to Birmingham, because of sex.[3]

[3]The one other female of 100 professionals hired there was a GS-7. In EEOC's Atlanta Region, the only female of 40 managers or supervisors selected was Petitioner, who took the Mississippi territory.

In November 1974, this suit was settled and Petitioner became EEOC Director in Alabama. At the same time, the integrated Missippi office she had led for four years won an award for performance during her tenure. In Alabama, Bertram Perry continued as Deputy Director. He had Petitioner's full support until his harsh treatment of employees' and his defiance of her direction required corrective action by her.

Petitioner recommended various plans for correcting Perry's conduct, including the hire of a temporary consultant, and progressive discipline. These recommendations never won approval of her Regional supervisors, who are of the same race and sex as Perry.

Perry's treatment of Petitioner became overtly racist, sexist, and defiant, while he covertly called her a crook.

[Evidence that Perry attacked her directly to certain employers came belatedly to Petitioner. Examples of his accusations are shown by:

(1) A 1977 letter from an employer who said Perry had told him Petitioner was forced out of EEOC's Jackson Office and had slapped a black man. (Both accusations are totally false. The Jackson office won

an award during her tenure.

(2) In deposition in this record Perry said Regional Director Hollowell (in 1975) met with him secretely (while he was Petitioner's Deputy) and asked him to gather evidence regarding his claims about her allegedly improper determination against an employer. (March 1980 deposition Tr. 121). Perry said he went to the employer].

Petitioner, isolated as a female EEOC manager in the South, was vulnerable beyond her understanding in 1975.

In June 1975, unaware of Perry's secret representations, Petitioner was awaiting approval from her Regional Director in Atlanta to issue charges to Bertram Perry. Perry had responded to a request from Petitioner for coordination on performance appraisals, by calling her filthy, threatening to have her put in jail, threatening (without explanation) to report her to the U. S. Attorney, and subjecting employees to a tirade of rage.

(Defiant conduct by Perry had also been reported by her predecessor as documented in this case). Petitioner, hoping Perry's behavior might be modified by penalty, recommended he be required to refute her charges or be demoted.

Response to Petitioner's request for appro-

val to initiate disciplinary action against Perry was swift. Her supervisor, without a warning or a hearing, withdrew Petitioner's authority as District Director. He divided most of her duties between his Deputy and Perry. He announced removal of her authority to her staff, and gave Petitioner "queries" to answer. This was six months after Petitioner returned to Birmingham after a settled Title VII suit, over the objection of this supervisor. (Ex D, 75).

The "queries," with answers and documents, showed the Regional Director had been misled. For example:

> "Query 1, p. 1. Since right-to-sue issued 9/24/74 and suit filed 12/26/74 which usually terminates process, why did EEOC processing continue?
> ANS. I did not take office in Birmingham until 11/4/74.
> a. Why was an investigation renewed?
> ANS. Not renewed. My predecessor did not stop it...Discretion is pursuant to Rules and Regulations of EEOC, Title 29, Chapter XIV, Part 1601.25b(d) as revised July 1, 1973.
> b. Who renewed investigation?
> ANS. My predecessor did not terminate it ....Initiation of civil action is not normally entered into District Office control records....
> Query 2, p. 2, Why was the determination issued before the memo?

ANS. Because I wrote the determination based on reading all the evidence collected. Though a reprisal charge had been filed in August 1974, approximately five months earlier, the investigator each month reported little or no production. My question of this was how the case came to my attention.

After discussion with the Deputy Director, and based on my impression also, I judged that the investigator would be unable to complete the case expeditiously, even with help..."

b. Upon what evidence was the determination based, since the memo hadn't been issued?

ANS. The file."

The Regional Director thought that Petitioner had issued a determination before she had the file on the case. An EEOC witness, Evangeline Swift, unaware of Petitioner's answers to the queries, said in an affidavit (unserved to Petitioner) which was incorporated by reference into her testimony, at the 1975 hearing in which Perry won injunctive relief) that Petitioner issued a determination on a case before she had the file.

Perry's deposition in this record (3/80 depo. Tr. 195) indicates that the U. S. Attorney in Birmingham, who opposed legal defense to Petitioner, was similarly misled (never having allowed Petitioner hearing on on the matter) and thought Petitioner issued a determination before she had the file.

On 15 August 1975 she and Perry were notified that in ten days "because of problems" they would be detailed and transferred to other locations. Thus began litigation underlying the Opinions here appealed.

2. Initial Proceedings Below:

Petitioner not only had to defend from Bertram Perry's suit against her. She had, the same day, to fight her own summary transfer before a different court.

During Perry's 1975 hearing, only the last part of which Petitioner attended because of notice problems, allegations against her (unknown to her) rather than due process developed as the gravamen of the case. EEOC counsel bypassed her. She asked private counsel retained for her separate action against EEOC, to enter an emergency appearance.

Her then counsel, waiting with her for her hearing later the same day, either because of short notice and preoccupation with that, or surprise, or some other reason, advised that the Perry hearing was only "preliminary." It was over without her finding a way to rebut. Her Answer in Perry's case was not due, and the legality of this hasty decision has support, e. g. Citizens Concerned for Separation of Church and State v. City and County of Denver, CA-10, 30 FR Serv 2d315 (1980).

Perry's 1975 hearing ended without the testimony of his supervisor or witnesses to his conduct against her.

In September 1975, the critical Opinion underlying these cases was entered, enjoining Bertram Perry's transfer in Perry v. Golub, 400 F. Supp. 409 on First Amendment grounds, and finding that attempt to move him was for reporting Petitioner to the U. S. Attorney. The case was found to be moot in 1976 and never tried (Perry v. Golub, 74 FRD 360), but the first Opinion has been cited widely and renewed by the District Court including in Opinion (25 EPD ¶31,488) here appealed.

Perry's suit which begat the 1975 Opinion was against Petitioner and two superiors. Only government counsel was served. (Petitioner had contacted the U. S. Attorney after Perry's threat, to ask what Perry said to him, and was told that he was keeping out of EEOC matters and didn't want to see her). Perry is written in history as a whistle blower for having reported her to "the U. S. Attorney," but Petitioner has never had a chance to confront any report. [Both times Perry sued her, a U. S. Attorney recommended the government not provide her with legal defense; she had no hearing on issues].

Petitioner was preoccupied with efforts to stay her own transfer the same day in 1975, Perry won an injunction. To stop her transfer, she re-opened her original Title VII suit. At her hearing, Judge Pointer caused informal agreement EEOC would maintain the status quo and she would withdraw her motion pending resolution of the issues through trial of Perry v Golub.

There was no decision noting her success, but from the other Court, Perry obtained a decision, not just on due process grounds as Petitioner favored, but on First Amendment grounds. The "Birmingham News" quoted from the decision to the effect that Perry blew the whistle on her mismanagement.

Immediately she sought reconsideration or early trial in Perry v. Golub. On grounds she had elected not to testify, the court denied her motion. (She had wanted to testify and was undefended by any counsel). She next conducted discovery in Perry v. Golub, when EEOC ignored her written request for help.

3. Falkowski v. (Lowell) Perry filed:

EEOC did not sustain her supervisor's proposed charges against Petitioner. Her discovery in the Perry case contradicted Perry's stories. Yet 10 months later, her authority was still being withheld and her administra-

tive complaint had not been decided.

In April 1976, Petitioner sued EEOC for the second time (Falkowski v. (Lowell) Perry) raising §1985 [see Kush v. Rutledge, 103 SCt 1483 (1983)] and Title VII issues. She asked for injunctive relief and prevailed partially. EEOC's failure to comply with Item 2 of her 1974 Consent Agreement was corrected. This provided class relief--EEOC's Merit Promotion Plan was changed to state that a selection from a "properly ranked" certificate could be contested on Title VII bases.

Her case was then transferred to Judge Guin, before whom Perry's case was pending.

On May 3, 1976, two weeks after Petitioner's suit was filed, EEOC's Acting Chairman called Petitioner and her "Deputy" to headquarters. She asked them to work together and said Petitioner's authority was restored.

Despite Petitioner's written request, no EEOC official told the Birmingham staff that misunderstandings had caused withholding of her authority. There was no show of top EEOC support to her, as justified by evidence. (EEOC was enjoined from acting against Perry without Judge Guin's permission).

Perry told one and all that a white female favored a white female, and claimed illegal conspiracy against him by EEOC.

Regional supervisors exercised autonomy. They bypassed Petitioner and talked to Perry. Perry continued to defy and villify her and abuse subordinates. Her administrative complaints were unresolved. She proceeded with discovery in her case.

Fee award Opinion (App.B, 82a) in her case (suddenly mooted because EEOC restored her authority) is the second of these appeals.

4. First Petitions in Perry v. Golub:

In September 1976, Petitioner filed a motion in Perry v. Golub, with affidavits from oppressed employees. She requested a hearing on proposed disciplinary charges to Perry. (EEOC headquarters had remanded her recommendations and grievances to her Regional supervisors, who sat on them).

The Court, instead of acting on her motion, as proven by a colloquy during a 1980 hearing on fees, made an ex parte suggestion (Transcript lodged with the Clerk, 17-18) THAT PETITIONER BE DROPPED AS A DEFENDANT IN BERTRAM PERRY'S CASE. This was while her request for a hearing in the public interest was pending!

Two weeks after Petitioner's motion, EEOC headquarters filed a petition for permission TO FIRE BERTRAM PERRY.

On November 23, 1976, the Court granted Perry's motion to drop Petitioner from the

case. Without hearing evidence on charges against Bertram Perry, the Court denied EEOC's petition as a sanction for failure of the agency to comply with discovery orders.

On November 30, 1976, the Court held, Perry v. Golub, 74 FRD 360, that since EEOC was not trying to transfer Bertram Perry, and since he would not let EEOC fire Perry, there was no justiciable controversy.

That Opinion on the untried case renewed the "whistle blower" findings, again making Perry a hero. Unmentioned and unresolved were issues as to whether he abused visitors and employees in the EEOC office and defied Petitioner, his supervisor.

On November 30, 1976, the same day as the 74 FRD 360 Opinion in Perry v. Golub, the same Court dismissed Petitioner's suit sua sponte, without a trial, as moot. Grounds were that EEOC had fully restored her authority. There was no hearing in which mootness could be disputed. The Opinion noting agency relief to her was not published.

The Court ordered EEOC to take no action against Perry in the future without Court approval. Subsequently, the Court granted Petitioner's motion for similar protection.

She appealed in both cases. EEOC "cross appealed" in hers.

5. After the Dismissals:

Conditions in the EEOC Birmingham Office worsened after the "mootness" decisions. Regional managers forbade Petitioner to take affidavits from employees. They rescinded her warnings to Perry. They granted grievances against her without hearing her.

EEOC headquarters refused her phone calls, did not process her grievances, and ignored proposed charges to Perry as discipline for new offenses (to which she attached draft petitions to the Court). Her requests for meetings were unanswered.

In July 1977, because of her vain reports for two years, and within the law applicable to recording consensual conversations (App. I, 142a), Petitioner recorded a conversation with Perry. He began it by calling her an "ugly white bitch" and a "crook". He said her warning (because he yelled at a subordinate) would be "in her ass". He said she was a crook because Judge Guin said she was. Petitioner sent a transcript and asked for help from EEOC Commissioners.

When help did not result, she sent it to the Fifth Circuit asking expedited action on her appeals. This was denied on Perry's motion, and the transcript struck as not part of the record below.

6. EEOC Petitions District Court Again:

On November 7, 1977, EEOC filed petitions with the Court seeking to fire Bertram Perry and Petitioner. Grounds stated against her included the recording which supported her reports of Perry's pattern of conduct. A ground stated against Perry was what he said, as quoted by EEOC, from the transcript of Petitioner's recording.

Following the hearings, the Court issued in November 1978, a published Opinion, 464 F. Supp. 1016, common to both cases. This Opinion excoriated Petitioner, relying on the 1975 whistle blower findings in a case mooted without trial, hearsay, and an EEOC rule against tape recordings [which rule was applied in conflict with statutory right (App. I, 142a) to record ones own conversation in self defense].

Witnesses subpoenaed by Petitioner to prove abusive conduct by Perry to visitors and employees had not been permitted to testify.

Testimony from Birmingham Office supervisors that Bertram Perry called his boss obscene names and defied her, was not even made known by the Opinion. Instead, the Court gratuitously found that Petitioner's conduct was "more like that of a wild scream-

ing woman in a fit of hysteria than that of a competent District Director."

The Perry Court became the hero of the Birmingham News again, which ran his picture and quoted him against Petitioner. That Opinion, on Perry's and Falkowski's "consolidated cases," 464 FS 1016, was appealed separately by Petitioner and her government-defended co-defendants.

7. First Appellate Action (1979)

Petitioner's motion to have the 1978 appeals consolidated with her appeal of the 1976 opinions that cases were moot failed.

In April 1979, The Fifth Circuit affirmed mootness, cancelled injunctive protection to Perry, and in an unpublished Opinion, "vacated underlying proceedings so as to spawn no consequences". Before Petitioner could ask the Fifth Circuit Panel to publish this degree of clarification, another Panel in August 1979, decided the published 1978 opinion was void. There was no record review and another unpublished Opinion, which confused the first. Petitioner sought certiorari, (No. 79-1244) which was denied.

8. Federal Supervisor Twice Undefended

Meanwhile, in September 1978, Bertram Perry sued Petitioner and former EEOC Chair Norton for five million dollars. His grounds were

Petitioner's recording Perry's conversation with her, and EEOC's effort to use the evidence, Perry v. Falkowski, (App. C, 122a).

The "government" again refused to defend Petitioner, but defended Ms. Norton.

Petitioner spent thousands of dollars and her brother's time (her lawyer for 4 of 8 years of this litigation) after Judge McFadden reinstated Perry's claims against her upon reconsideration, when the Fifth Circuit vacated injunctive protection to Perry.

In 1980, Petitioner sought leave to file counterclaims, not sought sooner because countersuit would have prevented backing from EEOC and the Department of Justice, which she continued to seek. The Court to whom the case was transferred denied this leave, and let Perry drop his suit against Petitioner (the second lawsuit which he dropped after her discovery).

The March 1981 Opinion (App. C, 122a) was inhibited by decisions of the Perry v. Golub Court which had just issued the fee Opinion canonizing Perry.

Petitioner requested amended findings for balance and, in light of deposition record, attorney fees from Perry unless her fees were repaid by the government. Denial led to the third and last of these appeals.

9. Untold Story:

No decisions suggest the nature of voluminous evidence of lack of credibility of attacks against Petitioner. There has been no trial of issues of integrity, no appellate review beyond jurisdictional issues, and no record clarification. The 1975 "whistle blower" decision is not even shown to be vacated by Shepard's Citations. Damaging vacated decisions are widely cited (App. J, 146a), including by federal judges in the District of Columbia where Petitioner works.

10. Appeal of Fee Opinions:

Petitioner appealed Findings in the fee Opinions. EEOC appealed the amount of fees to Perry, and opposed more fees to her. In appealing Bertram Perry's fees, EEOC stated:

> "...Supervisors in the office and the district counsel all heard Mr. Perry use offensive language on numerous occasions...often referring to Ms. Falkowski as "that bitch," "that thing in there"...and "ugly white bitch."... Mr. Perry also treated other employees in an offensive manner, shouting at them and accusing them of racism ... and sexual misconduct...The conduct of Mr. Perry and Ms. Falkowski had a devastating effect on all the employees in the office....They were afraid of Mr. Perry." (Record citations omitted here).

Although EEOC had not appealed mootness, it argued on the merits in opposing Perry's fees, forcing Petitioner to defend on the merits.

EEOC counsel quoted adverse findings by the Perry v. Golub Court against Petitioner's fee appeal, after having opposed her petition for certiorari on grounds that these same findings were vacated to spawn no consequences.

The findings, that Petitioner and Perry cursed, slandered, and threw paper at one another," are supported only by a fabrication from Perry to Petitioner's supervisor (Ex A, 52). Petitioner's supervisor used it as a basis for proposing to fire her. No EEOC reviewer could have analyzed the proposed action for sufficiency of evidence. The Perry Court did not check and balance the EEOC, but publicized charges against her as though supported.

The Court speculated that Perry withdrew his verified response to EEOC's petition and did not testify, to avoid being cross-examined. The only support for finding that Petitioner threw paper at Perry, was incredible hearsay.[4]

[4]The seriousness of Regional indifference to the implications of the report at the time it was made was called to the attention of the Court by Petitioner's counsel, but the Court discounted its seriousness.

11. Eleventh Circuit Action:

The Eleventh Circuit affirmed Perry v. Golub in part, by unpublished opinion, (App. G, 137a). Petitioner had raised unfairness of false stigma and false signals because the published decisions find on the merits of untried issues.

Expenses to Petitioner and her brother have been over one hundred thousand dollars because of having to defend against law suits and false accusations by Perry, credited without due process. When she has been unable to pay she has expended huge amounts of her personal time, costing not only her but her husband and family.

Petitioner seeks to continue a lifelong commitment to human rights with credibility, to ameliorate for herself and her family and the benefit of their future leadership this false published history.

FEDERAL QUESTIONS

Management of a civil rights agency, a Court's finding of guilt without a trial, management of a judicial overload so as to address published stigma by unpublished nullification, and rights of public officials who become the targets of "whistle blowers" are important federal questions.

REASONS FOR GRANTING THE WRIT

1. THE GOVERNMENT'S FAILURE TO INSURE LEGAL DEFENSE TO WHITE SUPERVISOR SUED BY BLACK SUBORDINATE FATALLY PREJUDICED HER DEFENSE.

The Perry v. Golub court said (Tr. lodged with Clerk, 36-38) that for years Petitioner has protested lack of initial opportunity to defend herself, as shown:

> "...What Ms. Falkowski made very clear to me through all those hearings was that what she wanted was a chance to defend her--what she considered to have been an attack to her good name. She fired her first lawyers or they fired her. I don't know which, but I got the impression from her testimony that she was intensely dissatisfied with them because they did not put her on the stand when I heard the Perry preliminary injunction, because she wanted to tell her side of what happened between her and Mr. Perry, and her own lawyers did not want her to because they had their own hearing to go to....
> ...The reason for appealing that case, even though she was dismissed as a defendant, was because she never had a chance to testify; and she wanted such a chance. And that, apparently, was missed at New Orleans, but she was the only person who appealed, and that was her only reason for an appeal."

Perry had free legal defense throughout (see p. 4), but Petitioner lacked even notice of charges. EEOC counsel told the Court in 1980 EEOC did not defend one of the officials sued by Perry. (Tr. with Clerk, at 78):

> "the Commission's interest in this case was to separate Ms. Falkowski and Mr. Perry...the Commission, rather than take sides, attempted to remove both of them, and, hopefully, at least prevailed against one."

The outcome of lack of any initial defense to an EEOC co-defendant in Perry v. Golub was anticipated by ABA Canon No. 2, which requires lawyers to assure legal defense. The damage of violating this Canon was well stated:

> "...If it is not received in time, the most valiant and skillful representation in court may come too late." Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1216 (1958)."

Discovery by Petitioner shows she could have proved the applicability to this case of Arnett v. Kennedy, 416 US 134,168 (1974):

> "...Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

2. DECISIONS TAINTED BY CONFLICTS OF INTEREST OF COUNSEL AND OTHER LACK OF DUE PROCESS SHOULD BE VACATED

Pursuant to Wood v. Georgia, 370 US 375 (1981), these decisions should be vacated. The Court was responsible to correct conflicts of interest of counsel apparent from the record.

The Court knew from his petition for fees, December 1979, that Perry's lawyer, William Gardner, Jr., represented Perry pro bono. This lawyer has long represented companies charged with discrimination before EEOC. The Court knew the lawyer's renown (App. A, 68a).

Mr. Gardner's interest was not in his client's loyalty, deserved or not, to his supervisor. Counsel for Perry was discrediting Petitioner to undermine her credibility in other cases where he represented employers against EEOC. [For example, with no clear relevance to issues of record, Gardner argued to the court that Petitioner engaged in "fishing expeditions" and tried to "make a federal case" of complaints and expand them, and Perry did not.]

In Hall v. Small Business Administration, 695 F. 2d 175 (CA-5 1983), Judge Rubin said:

> "Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance."

This applies to all officers of the Court.

Another kind of conflict was apparent.

From 1975, the Perry v. Golub court had knowledge that EEOC counsel presented the positions of Petitioner's co-defendants. (EEOC did not even obtain Petitioner's position, which of course, was not presented). Transcript of the 1975 hearing shows EEOC counsel entered an appearance for all defendants, and that no one else entered an appearance for Petitioner.

Initial lead counsel for EEOC, a black man did not cross-examine Perry when he accused his white female supervisor.

From EEOC's opposition to Perry's fee claim, the Court knew EEOC disclaimed responsibility for cost to Perry's counsel of Petitioner's depositions. EEOC held, in effect, that clearing a District Director's name did not contribute to the case.

The Court had an obligation to protect the parties from clearly unresolved conflicts of interest of counsel. The conflicts are shown by the Court's own words (App. B, 82a-122a):

> "...The plaintiff has articulated no trace of any logical reason that the EEOC should have attempted to contradict the testimony of its Regional Director. The obvious fact of the matter is that she later came to regret her decision not to testify in 1975 and is now trying to place the blame on EEOC counsel for not having undertaken to do what she had the opportunity to do but

elected not to do. Similarly, her contention that "the charges against her were never substantiated" is simply a repitition of her argument that the EEOC should have "refuted" the testimony of its Regional Director."

This sidesteps evidence which grew over the years, that EEOC's Atlanta Regional Directors credited a false attack, also unlawful under Title VII, and without hearing or grounds withheld Petitioner's authority until she sued. Management's responsibility not to support a racist attack is discussed in Lincoln v. Board of Regents, University System, Georgia, 697 F.2d 928 (CA-11 1983).

EEOC had removed Petitioner's authority and, by treating her as a wrong doer, implicitly supported Perry's claims. EEOC did not then attempt to resolve conflicting interests of codefendants by having her supervisor restore her authority as withdrawn because of misunderstanding, or consider her evidence provide her with legal defense based on it.

EEOC managers violated Federal Personnel regulations by refusing to issue a written decision that charges proposed against Petitioner in 1975 were not sustained.

The District Court describes conflicts of interest from which, under Wood v.Georgia, Supra, the Court should have protected Petitioner from 1975 on. In the hearing

on fees, the Court acknowledged her initial lack of defense. Yet in published Opinions the Court finds that Petitioner "elected not to testify" and renews vacated findings.

The District Court at the fee hearing smiled on avoidance by Perry of having to testify and provide admissible evidence on the tape recorded conversation. Thus the Court approved Perry's manipulating the proceedings instead of performing its obligation to adduce the facts.

Known evidence in the consolidated record of these cases screams against District Court findings in the fee awards, as not "the truth and right" of the case and "clearly mistaken," in accordance with the standard discussed in United States v. United States Gypsum Co. 1948, 333 U. S. 364, 395.

Furthermore, conflicts of interests of counsel which should have been addressed by the Court caused prejudice to Petitioner.

3. SEVERAL QUESTIONS OF FRAUD UPON THE COURTS SHOULD BE REVIEWED:

Moore's Federal Practice 7, pps. 507-513, analyzes the obligations and powers of Courts where there has been fraud upon the Court. Petitioner offers examples which she believes raise questions of conduct, in a milieu of judicial action which also raises questions.

EEOC Positions In This Litigtion

1. In 1975, EEOC took the position in Perry v. Golub that Bertram Perry was abusive, disruptive, and intemperate. For that he and his supervisor should be transferred because they didn't get along, EEOC decided:

EEOC had removed Petitioner's authority and, by treating her as a wrong doer, implicitly supported Perry's claims. EEOC understood no obligation to attempt to resolve misunderstandings or conflicting interests of codefendants or support Petitioner with legal defense, justified by evidence.

2. EEOC managers didn't sustain proposed charges against Petitioner, but failed to issue written decision to that effect required by the Federal Personnel Manual. Years later, EEOC counsel cited to the appeals court that her supervisor removed her authority, without mention that charges were not sustained.

3. EEOC counsel told different Courts contradicatory versions and breached representations to this Court:

(1) In 1979, EEOC counsel told the Supreme Court (App. K, 147a) in opposing her petition for certiorari, that findings stigmatizing to Petitioner in Perry v. Golub had been vacated to spawn no consequences.

(2) In 1982, the same counsel was of counsel on a brief which quoted adverse vacated findings against Petitioner to oppose her suit for legal support in the District of Columbia. That counsel also supervised counsel who, in brief to the Eleventh Circuit, claimed that vacated District Court findings adverse to Petitioner were fully justified.

(3) In 1982, EEOC counsel was "of counsel" on a brief filed by the Justice Department. The brief represented to a D. C. Court that EEOC provided legal defense to Petitioner in 1975 in Perry v. Golub. EEOC counsel who helped with this brief was the same counsel who told the Perry v. Golub Court in 1980 that EEOC didn't take sides between Bertram Perry and Petitioner.

[EEOC managers ascertain "facts" relating to employee litigation without hearing the litigant "because its in Court." Agency heads delegate their responsibility to a legal staff which may not advise them regarding evidentiary support for midcourse corrections to past management or legal advice].

Bertram Perry's Accusations

3. The earliest findings, those in the 1975 Opinion granting Bertram Perry injunc-

tive relief as a whistle blower are based on fraud. One example:

Two EEOC officials to whom Bertram Perry talked, believed that Petitioner issued a decision on a case before she received the file. One official was her supervisor, who queried her on what she based her determination, since the investigator's recommendation was dated a week later.

Another official was Evangeline Swift, who testified in 1975 when Perry won an injunction. Incorporated in her testimony was an affidavit to the effect that Petitioner issued a determination before she had the file. (Petitioner did not see the affidavit until weeks later).

In a March 1980 deposition from Perry which Petitioner took in his second suit against her, nearly four years after his first was mooted without trial, Perry admitted that he told the U. S. Attorney in Birmingham, that Petitioner issued a determination on a major case <u>before she received the file on the case from the investigator</u>.

In a colloquy during the deposition, Perry's role, not previously proven, comes out. He asserts that at the U. S. Attorney's Office, the man said he--

> "couldn't believe what his eyes were showing him."

Asked if he told the U. S. Attorney that Petitioner issued a determination before she had the file on the case, Perry replied by asking what else the evidence could mean.

Petitioner has never had opportunity to explain to those who denied her government legal defense without hearing, that she called for the file on the very same case before she wrote the determination, through Bertram Perry, her Deputy. Perry knew that Petitioner asked for the file in the course of monitoring productivity of employees. (Complexity of the case was the reason given by the investigator for his low case output).

Petitioner wrote her decision from the files and the draft recommendation from the investigator, and returned it with instructions, through Bertram Perry, that the investigator (also a conciliator), finalize his report and conciliate the case.

The investigator's report was finalized and dated after Petitioner's determination.

Petitioner has not had opportunity, since her early lack of legal defense, to prove that Perry used the above unusual but innocent circumstance to mislead persons to believe that Petitioner (whom he said slanted cases for attorneys) issued the determination before she had the file.

Petitioner's explanation was corroborated by deposition from the employee who attempted to conciliate the case.

In another situation, she proved she did not improperly fail a conciliation. The employer was not willing to make any offer to a charging party for whom "cause" was found. As Perry knew, in such a circumstance a second meeting would be contrary to EEOC policy. Further, the employer offered no counter to EEOC's written proposal. At Petitioner's request, the employer's attorney wrote her confirming this. That and similar evidence was in the record and called to the attention of the Court.

Such was the kind of evidence which caused Petitioner's authority to be withdrawn, which caused her to be denied legal defense, which caused Perry to win an injunction, and which has caused her to be disgraced.

Such was the kind of "evidence" on which the whistle blower case was made to the District Court by Perry, <u>who knew the facts were otherwise</u>. That is why Petitioner appealed Opinions in hers and Perry's cases and challenged mootness. That is why charges against her were never upheld.

Affirmance that the cases were moot, and financial hardship because of the irregula-

rity of both administrative and legal proceedings prevented Petitioner proving fraud and clearing her name.

In 1978, EEOC paired Petitioner and Perry in firing attempts. In proceedings before the Court (who had retained jurisdiction in moot cases) Petitioner showed that a grievance filed by Perry misreported an incident as proven by transcript of their conversation.

The Court suppressed the transcript as a basis for action against Perry, and wouldn't consider it in Petitioner's defense. Petitioner was again blocked from using proven deception by Perry.

Even when the Fifth Circuit vacated the District Court decision, it was on jurisdictional grounds, without record review or exposition of evidence.

THE PERRY V. GOLUB COURT:

In 1975, the Perry v. Golub Court, with grant of injunction to Perry, found there was a suggestion that Petitioner might be slanting cases for the benefit of certain private attorneys who were her personal friends.

Petitioner has vehemently denied this at every opportunity. She has no dearth of attorney friends, her lawyers are paid by her, her only pro bono attorneys having been her

brother, a patent lawyer, and now one of her sons, a new lawyer. But Perry had pro bono counsel who represents clients charged with discrimination before EEOC.

The District Court granted a substantial award to Perry's attorney, based on the whistle blower findings, not supported by a trial, and citing "wild screaming woman" and "paper throwing" decisions, supported, at best, by hearsay.

However, there was no record review which could impel the Appeals Court to assist Petitioner as it did plaintiffs in James v. Stockham Valves, 559 F2d 310 (CA 5 1977), by publishing that the same Court overly relied on proposed findings of Title VII defendant counsel. Or that in Little v. Southern Electric Steel Co., 595 F2d 998 (CA-5 1979) the same Court made findings adverse to a black plaintiff which were not supported by the record.

There has been no review which could show Petitioner has been discredited without basis.

Bias of the Perry v. Golub court was raised below and in this Court's No. 79-1244. It is best proven by the transcript of hearing on fees (lodged with the Clerk).

The transcript shows that the Court suggested Petitioner be dropped as a defendant

from Perry's case when she was awaiting the Court's ruling on permission to initiate adverse action proceedings against Perry.

It shows the Court, sua sponte, decided the cases were moot (when EEOC restored Petitioner's authority after her discovery evidence). It shows that contrary to published Opinions, the Court knew she didn't really ever elect not to testify.

The Court leapfrogged preliminary injunction findings after dismissing the case without trial, and used the findings as established to support a 1978 opinion.

After the District Court 1975 and 1978 Opinions were vacated, the Court essentially reiterated these findings when awarding fees.

What such judicial conduct indicates, whether bias or fraud, might best be determined by this Court.

The transcript of hearing on fees shows the Court asked Perry's lawyer to prepare a decision. No proposed decision was issued and request on behalf of Petitioner for a copy of any proposed decision was unanswered. (See James v. Stockham Valves, Supra, where a ground for reversing the same Court was the decision that findings reflected, not independent appraisal of the record, but a rubber stamping of arguments of a party).

The fee decision on Perry v. Golub, after the Court asked for a submission from Bertram Perry's lawyer, conflicts with the understanding of the case the Court expressed at the hearing on the fee petitions. (Transcript lodged with the Clerk).

FRAUD UPON THE COURT

The deceptive positions shown in this Part are more serious than that which caused this Court to overturn a judgment in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238 (1944). [Phony publicity campaign was used to make product appear more popular in patent litigation].

That foregoing deception did not countribute to false stigma. (Nor did burglarizing Watergate).

In a case involving contradictory positions to Court, because different counsel was involved in presenting the contradictory positions, the result was found not to constitute fraud. U. S. ex rel Bonner, 78 FRD 344 (1978).

Here the same counsel and supervisors are involved. They are assigned to represent certain officials of EEOC, in the name of representing the "government".

Hoaxes by Bertram Perry are proven in the record. EEOC lawyers and managers are

responsible to know the evidence, even to hear Petitioner. Voluminous evidence, which because of mootness decisions, is not before the Courts, is in EEOC files.

Petitioner is not heard on the issues, because EEOC tells her they are moot. Appeals have been pending on that for years, while EEOC lawyers tell Courts she is a wrongdoer, and committed actions she never committed with which she has never been charged.

Monroe v. United Air Lines, Inc., 31 EPD ¶33,329, US DC Ill (1982) at note 2, says that an employer may not leave to the Courts that for which it is responsible:

> "United would therefore also know Judge Flaum's decision was an erroneous one because based on incomplete information fully available to United."

One might assume that civil rights agencies would not leave an individual accused in history, with neither trial or publication that published accusations were mistaken. But prejudice and refusal to scrutinize past actions for error has caused greater wrong. Alfred Dreyfus, a jew, was left on Devil's Island for years. Meanwhile, the real culprit was tried and found "innocent" of treason. Not until Emile Zola's J'Accuse did the French government uncover error caused by prejudice and fear, and free Dreyfus. Captain Dreyfus by Nicholas Halanz.

EEOC's asking this Court to deny Petitioner's request for certiorari because findings were vacated to spawn no consequences, and then using the vacated findings against Petitioner in Courts, should be reviewed.

Bertram Perry's lies about Petitioner's case processing, upon which preliminary relief to him was based, should be reviewed.

Reiteration of stigma by a Court, both after a case was mooted without trial and after it was vacated, and contrary to record evidence, should be reviewed.

4. APPELLATE NULLIFICATION WITHOUT PUBLICATION, OF FALSELY STIGMATIZING PUBLISHED DECISIONS, DEPRIVES OF DUE PROCES

This Court has held that the Executive Branch cannot place the name of a civil servant on an "Attorney General's List" as suspect without a hearing, Joint Anti Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951). Petitioner's name has been published as having been reported to a U. S. Attorney as suspect, without any hearing. False findings against her made at the time a preliminary injunction was granted to her Deputy have been nullified[5] by Opinions of an Appellate Court, which are unpublished.

[5]Except by interpretation of the Perry Court that he may hear any attempt to act against Perry by treating his prior pleadings as a new complaint. (Tr. 59-93).

During oral argument on the first appeals, a member of the Fifth Circuit Panel asked Perry's counsel about findings adverse to Petitioner. This counsel responded that a footnote in Perry v. Golub explained that the Court had not found Petitioner guilty of anything. The appellate judge remarked that "the footnote giveth, but the Opinion taketh away."

Petitioner's counsel was then asked if her reputation wouldn't be taken care of if the Opinons below were vacated to spawn no consequences? That is what was done.

Mootness was affirmed, injunctive protection to Bertram Perry was nullified, and underlying proceedings were vacated to spawn no consequences. (App. D, 133a). However, the decision was stamped, "Do Not Publish" and reported "Affirmed and Vacated." It was not reported by Shepards, and it would have clarified nothing if it were, since what was affirmed and what was vacated was not explained in the Federal Reporter.

The second appeals, on the 1978 District Court Opinion in 464 F.S. 1016, were pending. Because of a comprehensive record, Petitioner hoped for reversal. Instead, the 1978 opinion was vacated as beyond the Court's jurisdiction by another unpublished Opinon. Petitioner

unsuccessfully appealed to this Court, No. 79-1244.

Opinions on fees have been based upon findings vacated by the Fifth Circuit. The Eleventh Circuit affirmed, except Perry v. Golub, affirmed in part. Which part is affirmed is not published. This leaves Petitioner's reputation unfairly under cloud.

Where a published opinion is affirmed or vacated entirely, lack of publication does not mislead. Affirmance of a damaging Opinion "In Part" continues the damage and does not conform to local rules.

Rule 21 of the Fifth Circuit provides for affirmance without opinion, and that the Court may enter either: "Affirmed. See Local Rule 21," or "Enforced. See Local Rule 21." Rule 25.1 requires publication of establishment of a new rule of law...or a factual or legal issue of significant public interest. Rule 25, Eleventh Circuit provides for affirmance without Opinion, but not for affirmance in part without Opinion.

The correction of potentially false and scandalous material found in a lower Court Opinion should be considered by an Appellate Court when it is deciding whether to stamp an Opinion with the words "Do Not Publish".

Board of Regents v. Roth, 408 U. S. 564

(1972) teaches:

> "...where [an individual's] 'good name, reputation, honor, or integrity is at stake,' or 'the State ...imposed...a stigma that foreclosed his freedom to take advantage of other employment opportunities,'...he may claim a deprivation of 'liberty' under the due process clause...".

See, regarding false stigma, Codd v Velger, 429 U. S. 624 (1977), and stigma without hearing, Wisconsin v. Constantineau, 400 US 433 (1971).

Relief won by Petitioner because her authority was restored was by unpublished opinion affirmed by unpublished opinion. She had been falsely stigmatized in her profession as an EEOC leader by the open and published removal of her authority. This removal was without hearing or grounds ever sustained.

Published incorrect findings against Petitioner contained in four Perry v. Golub Opinions have been nullified by unpublished appellate opinions. However, the findings are reiterated in published opinions which are now further appealed. Petitioner has never had a day in Court on findings attacking her integrity. The result is shocking to conscience and unconstitutional.

This Court found Congress to be subject to action under the Constitution in Davis v. Passman, 442 U.S. 288 (1979). Likewise, Courts are not exempt from constitutional strictures. Rodgers v. United States Steel Corp. (Rodgers 1), 508 F. 2d 152, 163 (3d Cir.), cert. denied, 423 U. S. 832 (1975).

This Court through its supervisory power should require Appellate Courts to assure due process in deciding whether or not to publish an Opinion.

5. WHERE FEE DECISIONS FIND ON THE MERITS OF UNTRIED CASES, AND RECORD SHOWS BIAS, THIS COURT SHOULD VACATE AFFIRMANCE AND ORDER REMAND FOR DECISIONS BY AN IMPARTIAL TRIBUNAL

Petitioner has standing in this consolidated case because of her interest in a non-discriminatory work environment, Rogers v. EEOC, 454 F2d 234, (CA-5 1971), cert.denied (1972); Trafficante v. Metropolitan Life Insurance Co., 409 U. S. 205 (1972); her "liberty" interest, Southern Mutual Help Association v. Califano, 574 F2d 518 (CA DC 1977); and property interest, Arizona v. California, 103 SCt 1382 (1983).

When Perry's attorney was awarded fees for 170 hours for matters raised by Petitioner, the District Court said:

> "...By 1976, it had become apparent that her presence as a defendant in the case was unnecessary, and in retrospect, that she need not have been joined as a defendant to begin with. However, that which was apparent in 1976 is not determinative of the appropriateness of her joinder at the outset of the case in 1975 when the full range of facts had yet to be developed."

The monetary cost of false accusations to Petitioner has been more than $100,000.00. These accusations and her pursuit of relief have deprived her of promotion opportunities, credibility, and friends in EEOC.

More important, Petitioner is a wife, who did not dishonor a name she chose; a mother, whose example is falsely published. She is a lawyer, falsely written in legal history as a person of doubtful integrity.

The fee Opinion in Perry v. Golub begins with citations of prior opinions which had been vacated to spawn no consequences. The Opinion contains many findings on merits, i.e.: App.A, 8a, 9a, 15a, 18a, 20a, 24a, and 29a, and concludes with:

> litigation will produce the immeasurable benefit of protecting other Government employees from the high-handed treatment accorded this plaintiff. It is with considerable reluctance that the Court comments on defendants' actions in this case,

> because the Court is all too well aware that the Court's 1975 decisions had the effect, not of inducing defendants to reconsider their attitude toward plaintiff, but rather of adding fuel to the flames of their efforts to silence and punish him. The Court is concerned that any comments in this Opinion might generate still another flare-up of defendants' attitude and therefore is constrained to use mild terms in describing defendants' actions. Even characterized in mild terms, it must be said that this lawsuit has produced the significant benefit of revealing retaliatory and discriminatory treatment of a Government officer and of serving notice that Government employees may not be treated as chattels to be removed or moved because of their exercise of their civil rights and their Constitutional rights."

United States v. Hamburg-American S.S. Co., 239 U. S. 466, 478 (1915) teaches that equity is to be done in moot cases. University of Texas v. Camenisch, 101 S. Ct. 1830 (1981) restates settled law that findings reached in a preliminary injunction hearing not noticed as a trial on the merits may not be final findings.

The Court erred in overlooking that Petitioner's appeal:

(1) Resulted in findings favorable to Perry and adverse to her being vacated.

(2) Resulted in injunctive protection which had prevented discipline to Perry for his treatment of her being vacated,

(3) Resulted in her prevailing to the same degree as Perry as of the time mootness was decided, and

(4) Resulted in Petitioner, as only appellant substantially prevailing by findings adverse to her being vacated, while Bertram Perry lost favorable findings and Court protection from discipline.

The Court, in awarding one-tenth the fees to Petitioner as to Perry (who was not sued whereas he sued Petitioner twice) again erred by finding (App. B, 105a), that EEOC had had grounds to discharge Petitioner. The Court based the finding on a vacated decision. Not only was this procedurally incorrect by denying Petitioner a trial on the "grounds" for discharge, but the finding is contrary to applicable substantive law (App. I, 142a).

The "whistle blower" Opinions, reiterated despite cases having been mooted without trial, are published history. Equity cries out that this published history be superseded.

Because of the importance of the management of a Federal Civil Rights agency, the problem of false signals being given to EEOC employees as to what constitutes acceptable behavior in office, the rights of Federal supervisors who are sued; the injustice of

violations of due process, and questions of bias and of fraud upon Courts, Petitioner prays that that this Court grant certiorari.

CONCLUSION

She asks this Court, pursuant to Rule 17 (a) to exercise its power of supervision because of departures from the accepted and usual course of judicial proceedings. At a minimum, she asks this Court to vacate and:
(1) remand for fee Opinions by an impartial tribunal, and
(2) cause published clarfication that these cases were administratively resolved, and that all questions concerning Petitioner's character and competence referred to by the Perry v. Golub Court have been withdrawn by EEOC, and that Bertram Perry voluntarily withdrew two lawsuits against Petitioner.

Respectfully submitted,

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2501 N. Kenilworth St.
Arlington, Virginia 22207
(703) 534-4270

OF COUNSEL:
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Edward Owen Falkowski, Esq., P. O. Box 18, Fayetteville, Tennessee, 37334

UNITED STATES GOVERNMENT

Exhibit G

TO : Malcolm Jorfida
Regional Director

DATE: 2/11/77

FROM : Bertram M. Perry
Deputy Director

SUBJECT:

Enclosed please find a narrative and documentary support that I am submitting for your consideration.

(DOCUMENT ATTACHED, RETYPED TO ENLARGE)

About 8.30 a.m. on February 16, 1977, I Went to Ms. Falkowski's office to ask her what we were going to do about setting up the administrative procedure for handling cases wherein the charging Parties have filed grievances with the union and more than 180 days have elapsed since the alledged discriminatory act had occurred. She looked at me with a blank expression and blurted out, "What is an alter ego?" I said, "Alter ego means one side of ones self and second self." She said, "Well then, if you are my alter ego I must be schizophrenic." I commented that maybe she was. She seemed not to be in contact with the question that I posed. I attempted to tell her why I was asking about the procedure and she began to cry. She said in a weird manner, "What's happening to me? She asked me had I seen the pictures of her grandbaby. I replied, "No". She said that she went to Huntsville on the 2nd of February to see her grandbaby. She told me that her daughter had delivered the baby on a farm in Tennessee and was living in a commune. She said she believed her daughter was crazy and is running her crazy. She began to

cry harder and sob louder. She said to me, "What am I going to do?" At this instance her private telephone rang. She tried to gain her composure, picked up the telephone and said "Hello". She asked me if I would please leave her office and close the door. As I closed the door she said, "Ethel".

The remainder of the day, Ms. Falkowski had little to say to me. She never called me back on the case about the union. Mr. Pugh asked several times during the day if I had gotten information on office policy on the case. I assured him I would have it by close of business, as soon as Ms. Falkowski got back to me.

Ms. Falkowski was in and out of the office all during the day. She had several conferences with Aaron Nelson. Between conferences with Mr. Nelson, about 2:30, I approached Ms. Falkowski about Mr.Pugh's problem. She told me she had no time to deal with me about the matter. However, she was just sitting at her desk staring when I knocked on her door. At approximately 4.29, I went to Ms. Falkowski's office concerning the long hair/facial hair problem as it pertained to the right-to-sue. This problem was emanating from Mr. Davis.

Mr. Davis said he needed to know what the policy was on the issuance of the notice of right-to-sue since Ms. Falkowski's policy issued in my absence on February 3, 1977, on the notice of right-to-sue is contrary and conflicting to Mr. Muse's memo of August 20, 1976 on the handling of long hair/facial hair cases. Mr. Davis became involved and concerned about the procedure when the District Counsel, who supervises this compliance function, had returned a right-to-sue forwarded to him by Mr. Davis with instructions to send him a written request before the right-to-sue could be issued. Immediately upon my getting Ms. Falkowski's approval to speak with her, I noticed a young Caucasian female sitting in Ms. Falkowski's office with her feet resting in another chair in Ms.Falkowski's office. She said that the lady's name was Ms. Addie Steele, a personal friend of hers. She told Ms. Steele that I was Mr. Jeffrey. My mouth flew open when she called me Mr. Jeffrey, but I did not make any comment. I nodded my head and asked permission to speak about the business problem. She told me to tell Mr. Davis process the case the same as he would any

other right-to-sue. I asked her if she was sure these were the instructions she wanted me to give Mr. Davis. She said, "why certainly". Mr. Davis was standing in the doorway, near Ms. Falkowski's office. I gave Mr. Davis Ms. Falkowski's instructions and he said that he did not believe I was serious. He said, "You got to be kidding." I told him to process case as Ms. Falkowski directed. While I was in the doorway talking to her, she referred to me several times as Mr. Jeffrey. At first I though she was trying to be funny and then I began to realize that she in fact thought I was Mr.Jeffrey.

Ms. Falkowski told me before I concluded my conversation with her that she would settle policy concerning the supreme court's decision on tolling the statue when a grievance was filed with the union as the first order of business on February 17, 1977. This is the problem that Mr. Pugh raised. At approximately 8:30 a.m. on 2/17, Mr. Pugh asked me if I had gotten the decision from Ms.Falkowski on the problem that he had raised the day before. I told him no, but I would discuss the problem with her momentarily. When I went to Ms. Falkowski's

office at about 8:20, I asked Ms. Word where was Ms. Falkowski. Ms. Word stated that Ms. Falkowski left with another woman a few minutes earlier. When I turned to leave Ms. Word's desk, I saw Ms. Falkowski and the same Caucasian female she introduced to me as Ms. Steele on February 16 standing by the elevator. Ms. Falkowski appeared to be leaving the office. I opened the glass door and asked Ms. Falkowski was she leaving for the day because if she was I had some important business to discuss. Ms. Falkowski stated that she was not leaving for the day and if I wanted to see her I could wait for her in her office. I went back to my office, picked up the memo on the notice of right-to-sue and started down the hall to see Mr. Davis. In the meantime I saw Ms. Falkowski and Mr. Nelson standing in the hall talking to one another. As I looked into Mr. Davis's office, he was not there. I returned to my office in route Ms. Falkowski and the same Caucasian female were standing in the hall talking. The elevator came and the Caucasian female, Ms. Steele, got in the elevator. I went to my office and picked up Ms. Falkowski's memorandum and went to her office. She was not there. She ar-

rived in a few minutes, went in her office and asked me what did I want that was so important. I told her that Mr. Davis and Mr. Pugh had been to me this morning about their compliance problems and that I was unable to answer them because I did not know and do not know what procedure she wants us to follow. She said, let me discuss Davis's problem first. She said, "I told you yesterday what my position was on that and I'm not going to discuss it anymore." I said, very well, it makes no difference to me if you want to give out conflicting and erroneous instructions to the supervisors." I turned to go out the door and she said, "Just a minute. Give me Muse's memo." I said I do not have it. She said "you have it in your hand. I order you to give me Muse's memo." She jumped up from behind her desk in an angry manner and glared at me as if she could kill me and she ran to a typewriter in her office and typed something on a piece of paper, she jumped up and held the paper over her face. I asked, "Is that all Ms. Falkowski?" and as I turned to leave she had the paper over her face. <u>She thereupon threw the paper on my body and I</u>

threw it back at her and asked what on earth she was doing. Ms. Falkowski was shaking and seemed to be out of control of herself and grabbed her coat and ran out of the office.

I have had no further contact with Ms. Falkowski.

There are other matters that are of importance in this matter that need to be stated here. Ms. Falkowski, Ms. Walsh and Mr. Alvin Golub are in constant communication with each other. Ms. Falkowski has stated that they must accomplish my removal before Ms. Walsh and Mr. Golub loose power with the change of administration. Ms. Falkowski stated to Mr. Jeffrey in the presence of Mr. Beasley, Mr. Bert and Bertram Perry that she would not let bygones be bygones. "I will die and go to hell before I let Bertram Perry get away with ruining my reputation." Ms. Falkowski went into a rage. Mr. Jeffrey dismissed the meeting because of her rage.

It is my firm belief that Ms. Falkowski starts these flare-ups first, because of her intense racial problems, second, because of her gross incompetence in the compliance and management areas, and third, the deep hate and jealousy of me.

About 8:30 a.m. on February 16, 1977, I went to Ms. Falkowski's office to ask her what we were going to do about setting up the administrative procedure for handling cases wherein the Charging Parties have filed grievances with the union and more than 180 days have elapsed since the alledged discriminatory act had occurred. She looked at me with a blank expression and blurted out, "What is an alter ego?" I said, "Alter ego means one side of ones self and second self." She said, "Well then, if you are my alter ego I must be schizophrenic." I commented that maybe she was. She seemed not to be in contact with the question that I posed. I attempted to tell her why I was asking about the procedure and she began to cry. She said in a weird manner, "What's happening to me?" She asked me had I seen the pictures of her grandbaby. I replied, "No". She said that she went to Huntsville on the 2nd of February to see her grandbaby. She told me that her daughter had delivered the baby on a farm in Tennessee and was living in a commune. She said she believed that her daughter was crazy and is running her crazy. She began to cry harder and sob louder. She said to me, "What am I going to do?" At this instance her private telephone rang. She tried to gain her composure, picked up the telephone and said "Hello". She asked me if I would please leave her office and close the door. As I closed the door she said, "Ethel".

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Ms. Falkowski was in and out of the office all during the day. She had several conferences with Aaron Nelson. Between conferences with Mr. Nelson, about 2:30, I approached Ms. Falkowski about Mr. Pugh's problem. She told me she had no time to deal with the matter. However, she was just sitting at her desk staring when I knocked on her door. At approximately 4:29, I went to Ms. Falkowski's office concerning the long hair/facial hair problem as it pertained to the right-to-sue. This problem was emanating from Mr. Davis. Mr. Davis said he needed to know what the policy was on the issuance of the notice of right-to-sue since Ms. Falkowski's policy issued in my absence on February 3, 1977, on the notice of right-to-sue is contrary and conflicting to Mr. Muse's memo of August 20, 1976 on the handling of long hair/facial hair cases. Mr. Davis became involved and

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concerned about the procedure when the District Counsel, who supervises this clerical function, had returned a right-to-sue forwarded to him by Mr. Davis with instructions to send him a written request before the right-to-sue could be issued. Immediately upon my getting Ms. Falkowski's approval to speak with her, I noticed a young Caucasian female sitting in Ms. Falkowski's office with her feet resting in another chair in Ms. Falkowski's office. She said that the lady's name was Ms. Addie Steele, a personal friend of hers. She told Ms. Steele that I was Mr. Jeffrey. My mouth flew open when she called me Mr. Jeffrey, but I did not make any comment. I nodded my head and asked permission to talk about the business I was there to discuss. Ms. Falkowski gave me permission to speak about the business problem. She told me to tell Mr. Davis to process the case the same as he would any other right-to-sue. I asked her if she was sure these were the instructions she wanted me to give Mr. Davis. She said "why certainly". Mr. Davis was standing in the doorway, near Ms. Falkowski's office. I gave Mr. Davis Ms. Falkowski's instructions and he said that he did not believe I was serious. He said, "You got to be kidding." I told him to process the case as Ms. Falkowski directed. While I was in the doorway talking to her, she referred to me several time as Mr. Jeffrey. At first I though she was trying to be funny and then I began to realize that she in fact thought I was Mr. Jeffrey.

Ms. Falkowski told me before I concluded my conversation with her that she would settle policy concerning the supreme court's decision on tolling the statue when a grievance was filed with the union as the first order of business on February 17, 1977. This is the problem Mr. Pugh raised. At approximately 8:30a.m. on 2/17, Mr. Pugh asked me if I had gotten the decision from Ms. Falkowski on the problem that he had raised the day before. I told him no, but I would discuss the problem with her momentarily. When I went to Ms. Falkowski's office at about 8:20, I asked Ms. Word where was Ms. Falkowski. Ms. Word stated that Ms. Falkowski left with another woman a few minutes earlier. When I turned to leave Ms. Word's desk, I saw Ms. Falkowski and the same Caucasian female she introduced to me as Ms. Steele on February 16 standing by the elevator. Ms. Falkowski appeared to be leaving the office. I opened the glass door and asked Ms. Falkowski was she leaving for the day because if she was I had some important business to discuss. Ms. Falkowski stated that she was not

leaving for the day and if I wanted to see her I could wait for her in her office. I went back to my office, picked up the memo on the notice of right-to-sue and started down the hall to see Mr. Davis. In the meantime I saw Ms. Falkowski and Mr. Walson standing in the hall talking to one another. As I looked into Mr. Davis's office, he was not there. I returned to my office in route Ms. Falkowski and the same Caucasian female were standing in the hall talking. The elevator came and the Caucasian female, Ms. Steele, got in the elevator. I went to my office and picked up Ms. Falkowski's memorandum and went to her office. She was not there. She arrived in a few minutes, went in her office and asked me what did I want that was so important. I told her that Mr. Davis and Mr. Pugh had been to me this morning about their compliance problems and that I was unable to answer them because I did not know and do not know what procadure she wants us to follow. She said let me discuss Davis's problem first. She said, "I told you yesterday what my position was on that and I'm not going to discuss it anymore." I said, "Very well, it makes no difference to me if you want to give out conflicting and erroneous instructions to the supervisors." I turned to go out the door and she said, "Just a minute. Give me Muse's memo." I said I do not have it. She said"you have it in your hand. I order you to give me Muse's memo." She jumped up from behind her desk in an angry manner and glared at me as if she could kill me and she ran to a typewriter in her office and typed something on a piece of paper, she jumped up and held the paper over her face. I asked, "Is that all Ms. Falkowski?" and as I turned to leave she had the paper over her face. She thereupon threw the paper on my body and I threw it back at her and asked what on earth she was doing. Ms. Falkowski was shaking and seemed to be out of control of herself and grabbed her coat and ran out of the office.

I have had no further contact with Ms. Falkowski.

There are other matters that are of importance in this matter that need to be stated here. Ms. Falkowski, Ms. Walsh and Mr. Alvin Golub are in constant communication with each other. Ms. Falkowski has stated that they must accomplish my removal before Ms. Walsh and Mr. Golub loose power with the change of administration. Ms. Falkowski stated to Mr. Jeffery in the presence of Mr. Beasley, Mr. Bert and Bertram Perry that she

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would not let [illegible] be [illegible]. "I will die and go to hell before I let [illegible] get away with [illegible]." Ms. Falkowski went into a rage. Mr. Jeffrey dismissed the meeting because of her rage.

It is my firm belief that Ms. Falkowski starts these flare-ups first, because of her intense racial problems, second, because of her gross incompetence in the compliance and management areas, and third, the deep hate and jealousy of me.

UNITED STATES GOVERNMENT

Memorandum

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2121 8TH AVENUE, NORTH
BIRMINGHAM, ALABAMA 35203

TO : Evelyn Falkowski
District Director

DATE: 7/10/78

In reply refer to:

FROM : Bertram N. Perry Bertram N. Perry
Deputy Director

SUBJECT: Answer to Evelyn Falkowski's Memorandum to B. N. Perry
Dated June 7, 1978

I agree that the control unit has to be improved. If you will recall, you started a destruction mission of the control unit when you first came to this office and your mission appears now to be successful. After completely destroying the unit you now would like to put the blame on me. If you will recall, you have signed several documents alleging that you are the first line supervisor of the control unit. You have assigned and reassigned every person in the unit at some point and time. You have removed two people from the unit, never seeking advise from those of us who were familiar with the unit. You have had to be told by the Regional

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Director to let me supervise the unit. May I remind you that a conversation with me about the control unit occurred on June 30, 1978, when I told you for the third time that Ms. Foote was going on leave and asked what arrangements were going to be made. You stated that you did not want to tell Ms. Washington about your plans because she would surely not report to work on the 3rd and she would blow up. You made several other statements that I will discuss later. There is little doubt in anyone's mind as to who destroyed the control unit, and who causes the confusion in this office.

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1. I informed you fully that Ms. Foote was taking three weeks leave. You told me to get Ms. Ann Washington to instruct the remaining people in the control unit in Ms. Foote's functions. I told you that Ms. Washington no longer worked in that unit and that I foresaw a lot of problems if I went directly to Ms. Washington and asked her to tell anyone anything about performing tasks in the unit. You told me that you would handle the

matter. I obtained Ms. Mim's promise that she would not go on leave until after the 4th of July to help get the work out in the control unit. I find no merit and no health in your accusations in paragraph 1.

2. It is a fact that when I discovered Ms. Foote was destroying EEOC files pursuant to your written instructions, I asked her to cease. I had to obtain the permission from the Region to do so. Permission to have Ms. Foote stop destroying files was granted by Mr. Beasley. Apparently you did not know the procedures for the destruction of files until I brought it to your attention. Now in your effort to make it appear as if I had some misunderstanding, you give me the instructions to follow the procedures. It appears that at no time is truth a part of your thinking or your actions.

3. I left your office because you attempted to throw a staple machine at me when I told you that I would

report to the United States Attorney any further destructions of the files in the indiscriminate manner you had outlined because I knew it would be a violation of the law to indiscriminately destroy Agency documents. You have capitalized on being a white female by screaming attack by engaging in the use of racial epitaphs and by even calling black men "black sons of bitches". I assure you that your vicious schemes will not carry me to the electric chair so I felt it my duty to leave your office and immediately call Mr. Jeffrey and report another one of your filthy tricks.

4. It is amazing how any question that is asked of you when you don't know the answer, and you usually do not know the answer, amounts to insubordination. Anytime Mr. Davis talks to you it amounts to insubordination. When your confidante, Aaron Nelson, talks to you or asks

questions it amounts to sound judgement. I find it ironic that Mr. Nelson is your star witness for all of the petty skirmishes you engage in. I find it incredible that to perform my duties according to Agency rules it has to be confirmed with someone who does not know his job and has refused to obey the rules. You allege that you have to work extra hours at night to keep the office going. It appears that I am here every night also and according to the documents you leave at the copying machine and other places in the office you are preparing your grievances on duty and off duty, day in and day out. It so happens that on Friday morning, July 7, 1978, you went to the beauty parlor during the first hour of work without taking leave as you do once a week. I cannot see how a person

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who spends a great deal of her time soliciting help from the supervisory staff, or any other willing participant, to get rid of me can be interested in the efficiency of this operation.

5. Paragraph 5 deserves little attention but might I bring it to your attention that your racist activity in the office caused me to have to go home on sick leave. It appears to me that you would ask your secretary what was my relationship to her sickness. I sincerely hope that you will find it within your meager understanding to try to work harmoniously and with some system in this office for whatever time there is remaining. To do so you will find in the future as you have in the past from your previous Directorship and as you have found in this office that nobody, without exception, can work with you except when they are on their knees praising you for your foolish activities.

Notes Regarding Exhibit E from Evelyn Falkowski

(Notes - July 1978)

Perry's memo of 7/7/78 contains numerous false statements and distortions. It is not possible to show the problem merely by underlining what sometimes is represented as Perry's perception. I deny Perry's account, and have underlined where he is giving a false account. Except for my word, I can offer no evidence on some points, but will gladly submit an affidavit and undergo questioning.

The burden of proof is on an accuser. Besides what Perry cannot substantiate and which is not true as I have underlined, Perry's own writing shows that he makes serious accusations against me, his immediate supervisor, which I believe would constitute grounds for adverse action against Perry if he cannot substantiate his statements:

> On page 1 he says I attempted to engage him in destroying government property and that my behavior is senseless; where is his evidence?for the former or the latter?

On page 2 he characterizes my actions as completely senseless and my analysis of situations as totally ridiculous. Is this a tolerable response to direction? In alluding to Charles Davis he alludes to a conversation in which he and Davis incorrectly said I was violating regulations.

Notes Regarding Exhibit F from Evelyn Falkowski

False statements or distortions are underlined.
Note Perry says I started a destruction mission of the control unit, removed two people from the unit [who bid out], destroyed the control unit, cause confusion.

Note that on page 2, after saying I tried to cause him to destory government property, Perry says:

> Now in your effort to make it appear as if I had some misunderstandin you give me the instructions to follow the procedures...
> ...I knew it would be a violation of law to indiscriminately destroy agency documents... I assure you that your vicious schemes will not carry me to the eleitric chair, so I felt it my duty to leave your office and immediately call Mr. Jeffrey and report another of your filthy tricks.

ANSWER TO SPECIFICATION 12A (CONTINUED)

I knew you would have heard much about me which wasn't good, but since I believed in your good faith, I thought communication was the answer.

I tried to give you time, but problems were unremitting and impossible to ignore, Perry accelerated his verbal war against me. I explained to you by telephone and sometimes by memorandum that Perry's charges of malfeasance, incompetence, and sexual misconduct against me were similar to those he made against my predecessor once he became eligible to be Director. My predecessor also was forced to seek to remove Perry. My predecessor is Black, and I had successfully directed an integrated office, so Perry's charges of racism against me certainly would seem to be spurious, but those charges chill my relationships with our subordinates. My predecessor is now a district director in the location of his choice, but Perry's accusations which can be proven or disproven in many instances have not been specifically ruled upon on the basis of all the evidence.

I asked that you help me obtain an agency decision, since Perry had evasively answered interrogatories, the case had been dismissed before this could be addressed, and my name could have been cleared. You never wanted to look back, or never had time, and I am resigned to waiting for the outcome of court proceedings, if there is no other chance for justice, but Mr. Perry will not table old issues, and he makes new false accusations against me every few days. Subordinates must seem not to see this or be in danger of the same treatment.

For example, Mr. Perry claims a subordinate hit him who denies it, and whom I heard Perry infer sexual misconduct against. Though the subordinate would have been justified in hitting Perry, I doubt he did. Perry has accused me of hitting him and of sexual misconduct. I haven't hit him, and I am not concerned about the private lives of others, but I know I am an absolute monogomist. Perry even accused me of offering my daughter to the monitor headquarters stationed here for four months (a year and a half ago). This is infamously false.

At a time, two weeks ago approximately, when Perry supposedly could barely move because of trouble with his back, while he was meeting with me and the union steward, Perry suddenly got out of his chair, dropped to his knees, and crawled over to look under my desk, saying he was looking for a tape recorder. There was no sign of any problem with his back.

I have to communicate, both to report and try to stop Perry's offenses and to protect myself from his misrepresentations. He says I use profanity and sometimes I do, but he distorts the context and degree, and I do not utter racial slurs. More important, where Perry claims I deliberately failed conciliation improperly, I can show proposals declined by Respondent without counter proposals. Where he says I suppressed a determination, I can show I reversed recommendation of those not responsible to determine. Where he says I maintained an improper accusation against a Respondent, I can show otherwise. Where he caused an agency official to swear that I issued a determination before I received the file, I can show he misled the agency official and can show how. Where he says I changed a determination after pressure from a private attorney, I can show my change was adverse to that attorney's interest.

Last month, on my own motion, based on supplemental information I accepted from Respondent and the supervisor's recommendation, I withdrew a "cause" determination and issued a "no cause" determination. Soon Perry, whom I believe had been on leave and uninvolved, was saying that his protests, which if there were any I didn't even know about, led to a determination I issued being rescinded.

I have tried to communicate the truth. I have been one of Bertram Perry's victims. I cannot believe that facts will not be faced, but I see no alternative for me but to continue to try to act as responsibly as possible, and to continue to try to perceive and tell the truth.

I have answered the proposed charges preliminarily. If you ultimately issue any of them, I want to further answer them in writing and orally.

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I have read the foregoing statement, consisting of 21 pages, and swear that it is true to the best of my knowledge and belief.

Evelyn Fabikowski

Sworn to before me this 24 day of November 1977

I certify that this is a true copy of P.248 of record in Baltimore

TRANSCRIPT OF PROCEEDINGS FOR PRELIMINARY INJUNCTION

Perry v. Golub, et al.
CA No. 75-6-1476-S filed October 1, 1975

Testimony by Donald L. Hollowell
Cross-examination by William Gardner
Page 111

EXHIBIT D 75

As far as you were concerned, Mr. Hollowell, was the consensus in which you joined that Mrs. Falkowski should go, that is, be taken out of the office, based on what had been disclosed to you regarding the serious problems which had occurred in the handling of cases?

A Not just that, sir. There was a history which I relate in my statement and in my affidavit which gave me to believe that that was an office which Mrs. Falkowski could not handle, even when she came, but I had a responsibility to support her in every way that I could to assist her in every way that I could in managing that office, if she could, but it was something that she wanted. I indicated to her and to others in advance of her coming that I did not think it was the office for her or the one that she could handle. What I am saying is that it was not just that.

APPENDIX A
(Reported 25 EPD ¶31,488)

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERTRAM N. PERRY	)	Filed and Entered
	)	Dec 16, 1980
Plaintiff,	)	
vs.	)	
ALVIN GOLUB, et als	)	CIVIL ACTION
	)	NO. 75-G-1476-S
Defendants	)	

MEMORANDUM OPINION ON PLAINTIFF'S PETITION AWARD OF COSTS AND ATTORNEYS' FEE

This case, which originated in 1975, has been both long and complicated, has raised important issues, and has involved a total of 12 hearing days before the Court. The Court now has before it plaintiff's petition for an award of costs and attorneys' fee, which came on for hearing before the Court on November 26, 1980, at which all parties were represented by counsel.[1]

Plaintiff bases his statutory entitlement to a fee award on Section 706(k) of Title VII of the Civil Rights Act, as amended [42 U.S.C.§1000e-5(k)] and the Civil Rights Attorneys' Fees Awards Act of 1976 [42 U.S.C. §1988]. Defendants deny that plaintiff is

entitled to any award and alternatively dispute the amount of fee sought. This Memorandum Opinion will set forth the Court's findings of fact and conclusions of law relative to plaintiff's entitlement to a fee award and the amount of the fee.

HISTORY OF THE LITIGATION

In order to analyze the contentions advanced by defendants in opposing plaintiff's entitlement to a fee award and in disputing the amount of the fee sought, it is initially necessary to review, as briefly as possible, the tangled and complicated history of this case, although it should be recognized at the outset that no one who has not lived through the proceeding will be able without the utmost concentration to fully follow all the twists and turns the road has taken.

The case started when plaintiff, who was then Deputy Director of the Equal Employment Opportunity Commission (EEOC) District Office in Birmingham filed his complaint on August 18, 1975. The gravamen of the complaint was that by means of a "detail", plaintiff was to be permanently removed from his position and assigned to another position elsewhere and that this action was being taken because he had "blown the whistle" on allegedly improper activities in the agency and because

of his race (black). The complaint alleged that defendants' actions were violative of, inter alia, his First Amendment right of free speech and of 42 U.S.C. §1985.

The Court held a hearing on plaintiff's motion for preliminary injunctive relief against the pending "detail" reassignment and on the basis of the evidence presented at the hearing, the Court held the plaintiff had satisfied the requirements for the issuance of preliminary injunction relief and that he was accordingly entitled to a preliminary injunction. Perry v. Golub, 400 F. Supp. 409 (N. D. Ala. 1975).

The next event of major significance came in 1976 when plaintiff filed a motion to amend his complaint to include Title VII as a jurisdictional basis. He had filed an administrative charge under Title VII, but at the time the lawsuit was filed in 1975, the charge had not been pending in the administrative procedure for the requisite time, and the motion for leave to amend was filed upon the expiration of the time required for administrative handling. The Court granted the motion for leave to amend, and plaintiff filed his amended complaint on May 7, 1976. The case thereafter proceeded on the original grounds carried

forward by the amended complaint (which included the First Amendment claim and the 42 U.S.C. §1985 claim) as well as under Title VII.

Then, in November of 1976, the Court entered two Orders, and to comprehend the confusion which subsequently ensued, it is necessary to recognize that there were two separte and different Orders, only one of which was appealed to the Court of Appeals.

The first of those Orders was entered on November 23, 1976. In that Order, the Court granted plaintiff's motion to substitute a defendant (a point not contested) and to drop defendant Evelyn Falkowski. The second Order was entered on November 30, 1976. That Order was concerned primarily with the imposing of a sanction on defendants under Rule 37(b), F.R.C.P., for failure to comply with a discovery order previously entered by the Court. During the hearing and meetings of counsel with the Court in connection with the discovery dispute, the Court was advised that the 1975 "detail" reassignment had been withdrawn and that there was then no presently existing effort to remove plaintiff from his position. Therefore, the Order entered on November 30, 1976 also dissolved the preliminary injunction but

retained jurisdiction and provided for review by the Court of any effort by defendants to remove plaintiff from his position. This latter provision of the Order was included because it was apparent to the Court that there was a high probability of a renewed effort to remove plaintiff, that being a prediction which proved to be accurate. This Order entered on November 30, 1976 is reported as Perry v. Golub, 74 F.R.D. 360 (N.D. Ala. 1976).

The next stage of the proceeding came in the Court of Appeals. As a preface to discussion of the events transpiring in the Court of Appeals, it is necessary to explain the reason for consideration here of the appellate action. The comments to come are not intended to imply any critical attitude. The sole and single reason for them is that defendants are relying on the appellate action as a ground for opposing plaintiff's fee petition, and it is essential to analysis of defendants' arguments to understand what happened at the appellate level.

The first step in consideration of the appellate proceeding requires that we return to the Order entered on November 23, 1976 which dismissed Ms. Falkowski as a defendant. (The November 23, 1976 Order was

not part of the November 30, 1976 Order and is unreported). It is uncommon for a defendant who has been let out of a case to insist on being put back in as a defendant, but that was the case here, as Ms. Falkowski challenged this Order dropping her as a defendant.

The practical reason behind this effort to return to the case as a defendant was that she wanted to have opportunity to take the witness stand and testify in rebuttal to testimony at the 1975 hearing relative to her. She had been present during the hearing in 1975, with her own counsel, but had not testified. Having elected not to testify at the 1975 hearing, she challenged her dismissal as a defendant in 1976 on the ground that she should be allowed to remain in the case so as to testify as a party defendant at any trial on the merits. Therefore, in pursuit of that result, she filed a notice of appeal from the Order entered on November 23, 1976 dropping her as a defendant.[2]

That was the one and only appeal taken from any Order in this case in 1976. No one other than Ms. Falkowski appealed the Order entered on November 23, 1976, and there was no appeal by anyone (including Ms. Falkowski) from the Order entered on November 30, 1976.[3]

The outcome of her appeal from the November 23, 1976 Order was a decision by the Court of Appeals on the November 30, 1976 Order, which had not been appealed by anyone. But to keep the sequence of events in chronological order, it is first appropriate to continue with a summary of the proceedings which took place in this Court before the Court of Appeals' decision in 1979.

During the pendency of the Falkowski appeal from the November 23, 1976 Order dropping her as a defendant, defendant EEOC filed a petition with the Court in 1977 for approval of a proposed "adverse action", consisting of the proposed discharge of plaintiff, which was subsequently modified to a proposal to transfer him to Washington, D. C. Plaintiff alleged that this effort to remove him constituted a continuation of the previous retaliation and discrimination against him. The issue thus joined was heard by the Court on a total of nine trial days at various times, whenever time could be made on the Court's schedule, between January 1978 and June 1978. On November 21, 1978, the Court entered a Memorandum Opinion sustaining the plaintiff's position. Perry v. Golub, 464 F. Supp. 1016 (N.D. Ala. 1978).

The next chapter in the sequence of

events came on April 25, 1979 when the Court of Appeals handed down its decision on the appeal taken by Ms. Falkowski. The appeal was from the November 23, 1976 Order dropping her as a defendant, but that Order was not addressed by the Court of Appeals' decision. Instead, the Court addressed itself to the November 30, 1976 Order (which was not appealed) and held that this Order had correctly dismissed on account of mootness, that the effect of such dismissal was to vacate the underlying proceedings "so as to spawn no consequences", and that it was beyond this Court's authority to have entered the provision of the November 30, 1976 Order requiring judicial review of proposed adverse action against plaintiff because the case was moot.

It is necessary to point out further that the Court of Appeals' characterization of the Order in this case as a "dismissal" of the action was not correct. The only dismissal aspect of the 1976 Order in this case was a dismissal of a petition filed by defendants as a Rule 37(b) sanction. The Court would not have dismissed this case in 1976 because it was abundantly clear from all that was said to the Court in the 1976 hearing on the Rule 37(b) sanction that defendants were not by any means through with their

plans relative to plaintiff. It may be presumed that the Court of Appeals' characterization of the Order as a "dismissal" of this action was generated by the fact that since the Order had not been appealed and was not before the Court of Appeals, it was not the subject of any detailed briefing by counsel, whose primary focus would have been on the November 23, 1976 Order, which was the only appealed Order.

Finally, while it is not given to a District Judge to rationalize appellate actions, the Court believes it understands the circumstances which resulted in the Court of Appeals' action in vacating an Order which no one had appealed. The Falkowski appeal from the Order dropping her as a defendant in this case was consolidated by the Court of Appeals with another appeal taken by her from an Order in another case (Civil Action No. 76-G-545-S) in which she was the plaintiff, and in which the plaintiff in the present case was not a party. This Court had enterered an Order in her case on November 30, 1976 dismissing her complaint on account of mootness. That Order in her case was based on factual grounds different from those in the present case. In the present case, the Court found in its November 30,

1976 Order that "The records before the Court demonstrate that there are reasonable grounds to apprehend a resumption of acts of alleged retaliation. This being so, the Court will in the exercise of its discretion retain jurisdiction of this case for the purpose of resolving any claims or issues regarding a recurrence of allegedly retaliatory actions against the plaintiff." In contrast, the Order in her case pointed out that "there is no suggestion of any reasonable grounds to apprehend a resumption of the acts of which the plaintiff complained in her complaint---." But since the Orders in both cases had been entered on the same day, and the Court of Appeals consolidated the appeals, the impression evidently was created that the Court had before it appeals from companion dismissal orders, although in fact the Order entered in this case on November 30, 1976 was not a dismissal and was not before the Court of Appeals because it had not been appealed by anyone.

It is now necessary to return to this Court's holding in 1978 that defendant's proposed removal or transfer of plaintiff was in violation of plaintiff's rights. That Order was appealed by all defendants. The Court of Appeals decided that appeal

on July 25, 1979, holding that since the Court of Appeals had held on the appeal decided in April 1979 that the action was correctly dismissed on account of mootness, this Court was without jurisdiction to have provided for judicial review of proposed adverse action against plaintiff, and the 1978 Order was accordingly vacated. To place this ruling in perspective, it should be remembered that the Court of Appeals' April 1979 decision, on which its July 1979 decision was based, was addressed to the November 30, 1976 Order, which had not been appealed.[4]

We may now turn to a happier chapter in this case. Plaintiff remains employed in the EEOC Birmingham office, where he is presently holding the position of Compliance Manager. The evidence introduced at the November 26, 1980 hearing included plaintiff's employee appraisals for the years 1979 and 1980. To the Court, and indeed to all who have a sincere interest in the efficient operation of the agency created by Congress to assure equal treatment of citizens in employment, it is a source of satisfaction that plaintiff's 1979 and 1980 appraisals reflect a high level of performance on his part. Both appraisals reflect

the highest level of performance in practically all categories. His 1979 appraisal includes the statements that "He strongly supports and enforces the law and agency policies.---His whole performance during this period has been excellent and borders on brilliance." His 1980 appraisal similarly includes the statements that he "is the most knowledgeable of Title VII of any that I have ever supervised" and that he "has consistently performed high-level management responsibilities (in the positions of Acting Deputy Director and Compliance Manager) with exceptional professional skill and ability---."

With the background of this necessarily abbreviated history of the case, it is now in order to consider plaintiff's entitlement to a fee award and, if so, the amount of the fee.

ANALYSIS OF FEE ENTITLEMENT AND ARGUMENTS ADDRESSED TO BOTH ENTITLEMENT AND AMOUNT

To a substantial extent, the contentions asserted by defendants argue that plaintiff is not entitled to any award at all and that if he is, he is not entitled to compensaton for his attorney's services throughout the entire history of the litigation. Rather

than first discussing these arguments in the context of fee entitlement and then again discussing them in the context of fee amount, all of these contentions will be analyzed in this sction.[5]

A. DO THE COURT OF APPEALS' DECISIONS PRECLUDE A FEE AWARD?

The initial contention urged by defendants is that since the Court of Appeals stated in its April 1979 decision that the effect of the "dismissal" in 1976 on account of mootness was to vacate the underlying proceedings "so as to spawn no consequences", a fee award is precluded altogether. The Court cannot accept this view for the following seperate and several reasons.

First, the undisputed facts are that the April 1979 decision was based on an Order which was not before the Court since it had not been appealed by anyone and that the Order in this case was not a dismissal of the action. For defendants to argue that the Court of Appeals nullified the proceedings in this Court necessarily must disregard the fact, which all parties concede, that the decision was based on a resolution of an Order never appealed and on a treatment of that unappealed Order as a dismissal although it was not a dismissal.[6]

Second, the contention that defendants became the prevailing parties in the Court of Appeals is not an accurate assessment of the situation. For one thing, the Court of Appeals' decision in April 1979 came on an appeal taken only by Ms. Falkowski, and the July 1979 decision was based on the April 1979 decision. No attorney's fee award is sought against her, since she has not been a defendant in this case for more than four years. Moreover, she could not logically be regarded as the prevailing party in the Court of Appeals. She appealed the November 23, 1976 Order dropping her as a defendant in order to be returned to the case so as to testify. What ensued from her appeal was no decision on the Order which she appealed and instead a holding that the case was correctly dismissed as moot.[7] Furthermore, the Court of Appeals' decisions were based on mootness, and "the holding of mootness is not a judgment on the merits." DeVolld v. Bailar, 568 F.2d 1162 (5th Cir.1978). See also Johnson v. State of Mississippi, 606 F.2d 635 (5th Cir. 1979), holding that plaintiffs were entitled to attorneys' fees for an appeal which became moot.

Third, the Court of Appeals' action in ruling that the "mootness" of the case

meant there should have been no further proceedings after 1976 cannot accurately be taken as precluding an award of attorneys' fees. On the contrary it is settled law that "a determination of mootness neither precludes nor is precluded by an award of attorneys' fees." Doe v. Marshall, 622 F. 2d 118 (5th Cir.1980). See also Rainey v. Jackson State College, 551 F. 2d 672 (5th Cir. 1977) and Iranian Students Ass'n v. Edwards, 604 F.2d 352 k(5th Cir. 1979). The standard to be applied, as the Fifth Circuit said in Doe v. Marshall, supra, is not whether the case is moot, but rather "The attorneys' fees question turns instead on a wholly independent consideration: whether plaintiff is a 'prevailing party'."

In this case, it is undisputed that plaintiff was the prevailing party in obtaining the preliminary injunction in 1975 enjoining the "detail" reassignment from his position in the EEOC Birmingham Office. It has never been contended that the Court of Appeals' decisions had any arguable effect on this Court's 1975 decision, and that phase of the case is plainly governed by the principle that "Even preliminary relief may serve to make a plaintiff a 'prevailing party' under the statute; the

lawsuit need not proceed to completion." Doe v. Marshall, supra.

If that were all which was accomplished by the lawsuit, defendants could say that plaintiff's stat as the prevailing party expired with thi ourt's dissolution of the preliminary injunction in 1976. But there is much more in this case. If every Order entered by the Court in the five year course of the lawsuit is disregarded, the Court is nevertheless firmly of the opinion that plaintiff is and has been the prevailing party from the institution of this lawsuit until today by achieving the goal of his lawsuit.

Here again, it is settled law that a plaintiff is a prevailing party with respect to attorneys' fee entitlement where the lawsuit has acted as a catalyst to the achievement of the sought-for-relief, even if no court order has been entered. E.g., Robinson v. Kimbrough, 620 F.2d 468 (5th Cir. 1980) ("Even though plaintiffs obtained no formal judicial relief their lawsuit was a significant catalyst in achieving their primary objective---."); Dayan v. Board of Regents, 620 F.2d 107 (5th Cir. 1980) ("the district court found that the plaintiffs obtained substantial

voluntary relief as a direct result of their lawsuit. Consequently, the award of attorneys'fees was proper."); Williams v. Miller, 620 F. 2d 199 (8th Cir. 1980) ("the fact that a suit is mooted by voluntary actions of the defendants is not enough to prevent plaintiffs from being prevailing parties within the meaning of §1988."); Donaldson v. O'Connor, 454 F.Supp. 311 (N.D. Fla. 1978) ("In the case at hand, plaintiff was released from Florida State Hospital shortly after this court set a hearing on his petition for habeas corpus. His release alone would qualify plaintiff as a 'prevailing party' and should lead to an award of attorney's fees."); Buckton v. National Collegiate Athletic Association, 436 F.Supp. 1258 (D. Mass. 1977) ("The clear intent of Congress was to award fees to parties who have effectively succeeded via litigation even though there may not be any formal docket entry signifying such success.").

It is necessary, in applying this principle, to be satisfied that the lawsuit in fact was the causal impetus in the achievement of the sought-for result, because without such a showing, fee awards could unjustifiably be obtained on the basis of actions which would have been taken regard-

less of the lawsuit. The present case abundantly satisfies the standard of the sought-for relief being achieved as a direct and proximate consequence of plaintiff's lawsuit. This fact would appear to be undisputed. Nevertheless, in order that there will be no doubt on the subject, the Court hereby finds as a fact that plaintiff achieved through the filing and pendency of this lawsuit the goal which he sought, that being to continue his employment in the EEOC Birmingham office. The Court further finds that had it not been for this lawsuit, he would no longer be employed with the EEOC and at the very least would have relegated to a position not commensurate with the high degree of skill and abilities he has brought to bear in the peformance of the positions he has held in the EEOC Birmingham Office. The Court accordingly finds that plaintiff is the prevailing party by virtue of having achieved through the lawsuit the relief which he sought.

B. IS PLAINTIFF ENTITLED TO AN AWARD COVERING SERVICES SINCE NOVEMBER 30, 1976?

It is appropriate, while the subject of the Court of Appeals decisions is under discussion, to consider defendants' related contention (addressed to the amount of the

fee award) that plaintiff is not entitled to any fee covering the period subsequent to November 30, 1976 because, under the Court of Appeals' decisions, there should have been further proceedings in the case subsequent to the entry of this Court's Order on November 30, 1976. The argument disregards the facts that defendants accepted the Court's November 30, 1976 Order without any appeal and that all of the ensuing proceedings in this case were occasioned by defendants' actions in this Court.

If defendants had thought this Court erred in providing in the November 30, 1976 Order for judicial review of proposed adverse action against plaintiff, in order to protect him against a continuation of the mistreatment revealed by the evidence in the 1975 hearing, they should have asserted that position by appealing the Order. The fact is that no one appealed the Order. The reason that defendants did not challenge the Order is of no legal consequence, but it may be in order to comment that the Court would like to think that responsible persons on defendants' side of the case were as shocked as this Court was by the "evidentiary record [at the 1975 hearing] which reveals a regrettably high handed and improper

treatment of [plaintiff's] rights and of the outstanding reputation which he has established as an able and dedicated career officer with the EEOC."

The further facts are that defendants thereafter initiated proceedings in this case in 1977 by petitioning for judicial review of the proposed adverse action against plaintiff, resulting in the nine hearing days and this Court's decision in 1978. On these facts, the Court cannot agree that plaintiff should be denied compensation for his attorney's services in responding to defendants' actions in the case following the entry of the unappealed November 30, 1976 Order.

C. IS PLAINTIFF ENTITLED TO A FEE AWARD UNDER SECTION 706(k) OF TITLE VII?

The Court will consider in order each of the arguments advanced by defendants in opposing an attorneys' fee award under Section 706(k), the attorneys' fee provision of Title VII.[8]

(1) That the case was not based on Title VII until the amended complaint was filed in 1976:

This contention (which is addressed to the amount of the fee rather than to fee entitlement) argues that Title VII came

into this case with the filing of the amended complaint in May 1976 and that plaintiff is therefore not entitled to any award under Section 706(k) for the period before then.

The Court cannot agree. The addition of Title VII in the amended complaint was not based on any new or different transactions or occurrences but simply added another jurisdictional ground to the case and accordingly related back to the filing of the original complaint under F.R.C.P., Rule 15(c). E. G., 3 Moore's Federal Practice ¶15.15(3) (2nd ed. 1978) ("An amendment which changes only the legal theory of the action, or adds another claim arising out of the same transaction or occurrence, will relate back. An amendment which changes the jurisdictional basis of an action will also relate back, the factual situation alleged otherwise remaining unaltered."). Compare Harkless v. Sweeny Independent School District, 554 F. 2d 1353 (5th Cir. 1977), cert. denied, 434 U.S. 966 (1977), in which the Court held that plaintiffs should have been given leave to amend to add further civil rights statutes to the case and observed in so holding that:

"The purpose of [Rule 15(c)] is accomplished if the initial complaint gives

the defendant fair notice that litigation is arising out of a specific factual situation.' Longbottom v. Swaby, 397 F.2d 45, 48 (5th Cir. 1968). Such is precisely the situation here."

(2) That this Court dismissed the Title VII aspects of the case in 1976:

Defendants next argue that the Order entered by the Court on November 30, 1976 dismissed plaintiff's Title VII allegations. The argument is factually erroneous. The only dismissal aspect of the Order consisted of the dismissal of a petition filed by defendants, such dismissal being a Rule 37(b) sanction for defendants' failure to comply with a discovery order which the Court had entered. The Court can only assume that defendants' erroneous characterization of the Order as a "dismissal" of plaintiff's Title VII claim, when it plainly was nothing of the sort, is based on the Court of Appeals' reference to the November 30, 1976 Orders in this case and the Falkowski case having been dismissals, but the undisputed facts are that the Order in this case was not a dismissal and was not before the Court of Appeals.

(3)That this Court's Opinions were not based on Title VII:

The next contention advanced by defendants in opposing an award under Section 706(k) of Title VII is that this Court's Opinions in 1975 and 1978 were based on infringements of plaintiff's Constitutional rights, thus showing, by implication, that his Title VII rights had not been violated. The argument cannot be accepted.

The reason the Court's 1975 Opinion contained no reference to Title VII was because Title VII was not in the case at that time. (The discussion in the preceding section has analyzed the relation-back effect of the amended complaint adding Title VII to the case in 1976). It should further be said, for complete analysis, that it is inaccurate to say the Court's 1975 Opinion was based only on a Constitutional right ground. That was one ground, but the Court also found from the evidence that there was a substantial likelihood that plaintiff would prevail on the 1985(1) ground.

Turning to consideration of defendants' argument that this Court's 1978 decision established the inapplicability of Title VII to the case, it should be noted, as a preface to consideration of this point, that the argument raises a conceptual problem, arising from defendants' position on the one hand

that the decision was nullified by the Court of Appeals and should not be considered and by defendants' position on the other hand that the decision should be considered. For purposes of evaluating defendants' present contention, the decision must be and is therefore considered.

There is no doubt that this Court's 1978 decision was in substantial part based on defendants' violations of plaintiff's Constitutional rights, as illustrated by the passage - here relied on by defendants - that "The evidence is overwhelming that the proposed adverse action against Mr. Perry is in retaliation for the exercise of his first amendment rights." (464 F. Supp. at 1020). But to take that as an inferred holding that plaintiff's Title VII rights had not been violated would not be correct.

To begin with, when any Court concludes in any case that a party is right on one ground, that conclusion does not operate as a sub silentio determination that the party is wrong on other grounds. Similarly, if the Court had concluded plaintiff had no case under Title VII, it would have said so, and there is nothing in any of the Court's Opinions expressing any such conclusion.

Furthermore, the 1978 Opinion reflects the Court's conclusion that plaintiff's Title VII right to non-racial treatment in employment had been transgressed. Among the Court's findings from the evidence was that a defendant (who is white) had stated "that Mr. Perry was 'aggressive or forward for a black man.'" (464 F. Supp. at 1021). There would have been no occasionfor the inclusion of this finding if the decision had been based solely on the ground that plaintiff was being subjected to retaliation for having exercised his First Amendment right to criticize the agency. The inclusion of this finding based on racial animus adequately shows, without any need for retrospective explanation by the Court, tht plaintiff's Title VII rights were very much in the case.

Still further, it is in this case undisputed that both the constitutional and statutory grounds on which plaintiff's case is based arose out of the same set of facts. Compare Southeast Legal Defense Group v. Adams, 436 F. Supp. 891 (D.Ore. 1977), holding that the Civil Rights Attorneys Fees Awards Act "provides for an award where both fee and non-fee claims are al-

leged, and plaintiff prevails on the non-fee claim" when the claims arise out of a common nucleus of operative facts.

Finally, when this case is viewed in terms of the overall result achieved by plaintiff, the critical inquiry is not what this Court held at any given time during the history of the litigation, but rather whether plaintiff had a Title VII claim which contributed as a catalyst to his becoming the prevailing party, not by Court decision, but by achieving the goal he sought from the first of retaining his position in the EEOC Birmingham office. Viewed in that light, the Court is satisfied that plantiff is the prevailing party under Section 706(k). It is certain that a party should not be entitled to an award under Section 706(k) when he achieves the sought-for result without his Title VII claim having contributed to the achievement of that goal. But in this case, the Court is convinced that plaintiff had a substantial Title VII claim which contributed as a catalyst to the result which he sought and achieved.

(4) Repetition of the 1976 arguments in opposition to plaintiff's motion for leave to amend:

Defendants also argue that plaintiff was

not entitled to add Title VII to his complaint by the 1976 amendment because the administrative handling had not been completed and because defendants were allegedly prejudiced by the amendment. These arguments were exhaustively briefed by the parties and resolved by the Court when the question was before it in 1976 on plaintiff's motion for leave to amend the complaint, and defendants' repitition of those arguments need not be again decided by the Court. There have been many complexities in this case, and deciding the same issue twice should not be added to the list of complications.

In sum, the Court finds that plaintiff is the prevailing party and is entitled to an attorneys' fee award under Section 706(k) of Title VII.

D. IS PLAINTIFF ENTITLED TO A FEE AWARD UNDER THE CIVIL RIGHTS ATTORNEYS FEES AWARDS ACT?

It should initially be noted that since the Court finds plaintiff to be entitled to a fee award under Section 706(k) of Title VII, it is unnecessary to decide fee entitlement under any other statute. Nevertheless, in the interest of complete

resolution of all the issues and contentions raised in the attorney fee proceeding, the Court will resolve the question of attorneys' fee entitlement under the Civil Rights Attorneys Fees Awards Act of 1976 (42 U.S.C.§1988).

This 1976 statute, enacted in response to Alyeska Pipeline Service Co. v. Wilderness Society, 421 U. S. 240 (1975), authorizes fee awards in, inter alia, actions to enforce Reconstruction era civil rights statutes.[9] The following is an analysis of each of the arguments advanced by defendants in opposing an award under the Civil Rights Attorneys Fees Awards Act:

(1) That the case is not based on any statute referred to the Act:

The position originally taken by defendants in opposition to the fee petition was that this case is based on an infringement of plaintiff's Constitutional rights and not on any of the civil rights statutes refered to in the Civil Rights Attorneys Fees Awards Act.

It is anamolous that the Act authorizes awards for proceedings to enforce civil rights under the statutes referred to in the Act while not making provision for proceedings to enforce the even more fundamental

rights guaranteed by the Constitution except to the extent that Constitutional violations are allegedly carried out under color of State law so as to be within the coverage of 42 U.S.C. §1983. This anomoly is illustrated by defendants' argument that the "only violations" were of plaintiff's due process rights under the Fifth Amendment and his free speech rights under the First Amendment. However, it is unnecessary to dwell on this point.

The conclusive fact is that this case is based on a statute referred to in the Civil Rights Attorneys Fees Awards Act. The statutes on which this lawsuit is based include 42 U.S.C. §1985, which is among the statutory proceedings for which the Civil Rights Attorneys Fees Awards Act authorizes fee awards. The complaint (amended and original) alleged violations by defendants of 42 U.S.C. §1985. Similarly, in concluding from the evidence at the 1975 hearing that there was a substantial liklihood plaintiff would prevail on the merits, the Court relied on, inter alia, the finding - based on the §1985 ground - "that the 'permanent reassignment' constituted an attempt to prevent him from discharging the duties of his office or to injure him in his person or property on

account of the lawful discharge of the duties of his office." (400 F. Supp. at 417).

It is thus apparent that this case is an action to enforce rights provided by 42 U.S.C §1985, bringing it within the categories of cases for which fee awards are authorized by the Civil Rights Attorneys Fees Awards Act.

(2) That Title VII provides the exclusive remedy:

The argument principally relied upon by defendants is that plaintiff, as a Federal employee, has no enforceable rights under §1985 because Title VII provides the exclusive and preemptive statutory remedy for Federal employees.

It is true that to the extent a Federal employee is suing to redress acts or conduct proscribed by Title VII, then Title VII is the exclusive source of his statutory rights. The Supreme Court established this principle in holding in Brown v. General Services Administration, 425 U.S. 820 (1976) that Section 717 of Title VII is "an exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination." It follows that while §1981 was among the statues invoked by plaintiff's complaint filed in 1975 prior to the Supreme Court's decision in the Brown case, he

cannot now be regarded as having an enforceable §1981 discrimination claim.

However, the result sought by defendants goes much further than that, because defendants would have the Court hold that under the Supreme Court's decision in Brown, any and all rights Federal employees have under each and all of the Reconstruction civil rights law have been preempted by Title VII.

The Court considers that to be a wholly unjustified expansion of the Brown holding. The rationale of Brown is that when Congress amended Title VII in 1972 by adding to the statute §717 of Title VII, bringing Federal employment within the coverage of the statute, it intended §717 to be the exclusive remedy for causes of action based on rights provided by Title VII, and since racial discrimination in employment is proscribed both by Title VII and by §1981, there is no longer a §1981 cause of action in Federal employment for racial discrimination. To proceed from this proposition to the conclusion that there is no cause of action in Federal employment to enforce the rights guaranteed by every other civil rights law would be an illogical and disastrously far-reaching result.

Nevertheless, defendants argue that this result is mandated by the Fifth Circuit's

decision in Newbold v. United States Postal Service, 614 F.2d 46 (5th Cir. 1980), in which the Court held that the plaintiff could not sue under Title VII because he had not followed the administrative steps required for suit under that statute and that he could sue under §1981 because Title VII is exclusive "for redress of federal employment discrimination." The Court then stated, in the passage of the opinion relied on by defendants, that:

> "There is no union or individual defendant in Brown, so it does not squarely control with respect to suits under §1981, 1983 or 1985 against Moore and APWU. However, the Brown court's broad language on preemption and exclusivity suggests that there is no cause of action against individuals under §1981, et seq."

This Court is firmly convinced that the Fifth Circuit's comment in Newbold was not intended and should not be taken to establish any rule of law for this Circuit that Federal employees must find their statutory civil rights in Title VII or else have none.

To begin with, the comment should be read in the context of the case before the Court of Appeals. The plaintiff there alleged discrimination and a conspiracy to discriminate, so it was clear, under Brown, that he

had no discrimination cause of action under §1981. There was no allegation of a cause of action based on rights guaranteed by any other civil rights statutes..

Similarly, Newbold was a brief per curiam opinion containing unmistakable indications of the Court's conclusion that the pro se complaint there was frivolous, and this Court cannot believe the Court of Appeals intended its disposition of such a case to create the far-reaching and significant impact of limiting the statutory civil rights of Federal employees to Title VII alone.

Moreover, the argument that such was the Court's intention in Newbold is at odds with the detailed and exhaustive consideration which the Court gave to the civil rights of Federal employees in Porter v. Califano, 592 F.2d 770 (5th Cir. 1979). Porter was a reversal of this Court, and this Court considers it to have been an entirely correct reversal. When the case was before this Court, the plaintiff disclaimed reliance on the claim asserted in her complaint alleging her First Amendment right of free speech was violated because she received a disciplinary suspension in retaliation for making protected speech. Since she disclaimed reliance on this claim, this Court, with misgivings, did not consider the merits

of it. When the case reached the Court of Appeals, the First Amendment claim was re-activated. The Court held she was entitled to a trial on the merits of her First Amendment claim, that being precisely the result this Court would have reached if she had not disclaimed reliance on the claim when the case was in this Court. The tenor of Judge Goldberg's opinion for the Court of Appeals in the case reflects an unmistakable determination to establish that Federal employees not to be relegated to second class citizenship in the enforcment of their civil rights, as illustrated by the following passage from the opinion:

"This case involves the constitutional and statutory rights of a federal employee punished for speaking. In recent years, Congress and the courts have come a long way in expanding and fortifying those rights and in conferring on public employees citizenship of the first class. This decision is another episode in that journey."

It is thus this Court's opinion that Porter and not Newbold provides the accurate guide to the way in which the District Courts in the Fifth Circuit sould view the assertion of civil rights claims by Federal employees.

Furthermore, the argument that Newbold limited the statutory civil rights of Federal employees to Title VII alone is additionally at odds with the Supreme Court's decision in Davis v. Passman, 442 U.S. 228 (1979). In that case in which the plaintiff sued on a Constitutional tort theory alleging sex discrimination n employment, the defendant argued that Brown limited her to Title VII and that since she had been a Congressional employee outside the coverage of Title VII, she had no cause of action. The Court rejected the argument and held that "§717 [of Title VII] leaves undisturbed whatever remedies petitioner might otherwise possess."

So also here, this Court concludes that encactmentof §717 bringing Federal employment within Title VII did not deprive the plaintiff in this case of the statutory civil rights guaranteed by §1985.

(3) That §1985 does not allow relief against Federal officials:

The next contention advanced by defendants in opposing plaintiff's entitlement to an award under the Civil Rights Attorneys Fees Awards Act is that "Section 1985 does not allow relief against the actions of

federal officers acting under color of federal law."

The conclusive answer to the argument is that it is contrary to the Supreme Court's decision in Butz v. Economou, 438 U.S. 478 (1978). In that lawsuit by a Federal employee alleging that officials of the Department of Agriculture had retaliated against him because of his criticism of the department, it was argued on behalf of the defendants that they were protected by immunity. The Court expressed its rejection of the argument as follows:

"The single submission by the United States on behalf of petitioners is that all of the federal officials sued in this case are absolutedly immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the violation was knowing and deliberate. Although the position is earnestly and ably presented by the United States, we are quite sure that it is unsound and consequently reject it."

With the Supreme Court having established that Federal officals are not immune from

liability for damages in these circumstances, this Court is satisfied that the defendants in the present case cannot claim immunity in similar circumstances. By the same token, this Court does not consider the application of Butz to be confined to Constitutional tort cases and is of the opinion that is it equally applicable to cases alleging a violation of the rights guaranteed to citizens by §1985. Compare Stith v. Barnwell, 447 F. Supp. 970 (M.D.N.C. 1978), which was a suit alleging a conspiracy by Federal officials against plaintiff (a former empoyee) because of his efforts to increase minority participation and racial equality in Housing & Urban Development programs. The Court stated that:

"That Court notes that there is nothing in the language of §1985(1) to preclude its application to defendents who were acting as federal employees, given an otherwise appropriate set of circumstances.---There would appear to be no constitutional infirmity with construing §1985(1) to include defendants who were acting as federal employees. The Court is of the opinion that §1985(1) would apply where defendants who were acting as federal employees were participating in a conspiracy otherwise proscribed by the subsection."

(4) That a cause of action under §1985 requires a showing of class-biased animus:

The next contention advanced by defendants in opposing to an award under the Civil Rights Attorneys Fees Awards Act is that there can be no maintainable claim under §1985 unless defendants' actions were based on a racial or other class-based animus, and, according to defendants' view, "Plaintiff has clearly made no allegation of class-based animus and the Court has made no such finding."

The arguement is not well-taken. The class-based animus requirement ws established in Griffin v. Breckenridge, 403 U.S. 88 (1971) with reference to §1985(3), which proscribes a conspiracy to deprive a person or class of persons of the equal protection of the laws. The defendants' argument assumes that class-based animus is an essential element of §1985 (1) as well as §1985(3), but that is not an acceptable assumption. On the contrary, to engraft the class-based animus requirement into §1985(1) would virtually negate the operation of that provision by precluding its applicability to all situations except those in which there is a class-wide animus against citizens in the performance of the duties of public office.

Furthermore, even if it is assumed

arguendo that the class-based animus requirement of §1985(3) is applicable to 1985(1), the Court is convinced that this requirement is satisfied in the present case in two alternative respects.

It is first of all satisfied by allegation, proof, and finding of fact that defendants' actions were motivated in part by animus against plaintiff because of his race, he being a black person who spoke out in criticism of his white superior in the agency and obtained a preliminary injunction which was conceded by defendants to be an "embarassment" to the white official of the agency who orirginated the "detail" reassignment of plaintiff in 1975.

So also, the Court concludes that if the class-based animus requirement is part of a §1985(1) case, it is further satisfied by proof that defendants' actions revealed animus toward agency employees other than plaintiff who have functioned as "whistle blowers" in speaking out in opposition to agency actions. The evidence before the Court included uncontroverted proof that an agency employee who criticized one of the defendants in this action was transferred and has not been promoted since then. It similarly included undisputed

proof that another employee who had expressed criticsm of the agency has received unfavorable treatment. That, in the Court's judgement, would amply establish class-based animus if it is an element of a §1985(1) case. Compare Britt v. Suckle, 453 F. Supp. 987 (E.D. Tex. 1978), in which the Court held that if class-based animus is an element of a §1985(2) case, it was satisfied by the allegation that employees were "harrassed and prevented from vindicating their right to workmens'compensation benefits in the state courts."

The above constitute all the arguments asserted by defendants in opposition to fee entitlement under the Civil Rights Attorney Awards Fees Act.[10] The Court cannot agree with the arguments and finds that plaintiff is a prevailing party entitled to an attorneys' fees under the Civil Rights Attorneys Fees Awards Act.

E. WAS THE FEE PETITION TIMELY FILED?

The fee petition was filed on December 26, 1978. Defendants' position that this was not a timely filing is based on the following contentions:

(1) That the fee petition should be treated as a Rule 59(e) motion to alter or amend judgement:

This contention is based on this Court's November 30, 1976 Order having included a provision that "The question of costs is reserved for future determination by the Court." Paragraph 5 of November 30, 1976 Order, 74 F.R.D. at 369). The theory constructed by defendants on the basis of this provision of the 1976 Order is that the term "costs", as used in such provision, did not encompass an attorneys' fee, that the fee petition was thus in effect a motion to alter or amend this provision of the Order, and that under F.R.C.P. Rule 59E(e), it was required to have been filed within ten days following the entry of the Order.

The argument does credit to the ingenuity of defendants' able counsel, but it is unsound, because the term "costs" as used in this provision of the Order was intended to encompass attorneys' fees. Moreover, the statutes under which a fee award is requested define the term "costs" as including attorneys' fees. Both Section 706(k) of Title VII and the Civil Rights Attorneys Fees Awards Act refer to "a reasonable attorney's fee as part of the costs."11

(2) That a motion for costs must be filed within 5 days:

Defendants' alternative argument that "Rule

54 provides that a motion for costs should be filed within 5 days" is not correct. The provision of Rule 54 cited by defendants is Rule 54(d), which provides that "Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court." This provision is totally without application here because the petition is not before the Court on review from any taxing of costs by the Clerk. The principle which is applicable here is that "Rule 54(d) contains no specific provision as to time for taxation of costs---." 6 Moore's Federal Practice ¶54.77(9) (2nd ed. 1976). A petition for a fee award should be filed within a reasonable period of time following the conclusion of a case or a stage of a case, and that was done in the present case since the petition was filed within a month following the Court's decision in November 1978, which was the last stage in proceedins on the merits in this Court.

F. SUMMARY OF DECISION AS TO FEE ENTITLEMENT:

Based on the facts and points set forth above, the Court finds that the fee petition was timely filed and that plaintiff is entitled to a fee award as the prevailing party

under either Section 706(k) of Title VII or the Civil Rights Attorneys Fees Award Act, or both.

It is therefore in order to turn to consideration of the appropriate amount of the fee to be awarded.

DETERMINATION OF A FAIR AND REASONABLE FEE AMOUNT

The amount of the fee award requested by plaintiff at the hearing on November 26, 1980 is based on the amount of time, without any premium or bonus add-on. Plaintiff's lead counsel has 1,094 hours in the case, associates in his law firm have 276 hours, and law students employed by his firm have 178 hours.[12] At the requested hourly rates of $75 for lead counsel, $40 for associates, and $20 for law students, the fee award sought is $96,650.[13]

A. ANALYSIS IN LIGHT OF THE JOHNSON FACTORS:

Our Court of Appeals' opinion in Johnson v. Georgia Highway Express, 488 F. 2d 714 (5th Cir. 1974) is the leading decision, not only in this Circuit but throughout the Nation, on the evaluation of attorney fee requests in civil rights cases.[14] The following sections will evaluate the reasonableness of the request in light of the 12 factors

which the Court expressed in Johnson as guidelines for the assessment of fair attorneys' fees.

(1) Time and labor required:

Analysis of this factor will start with defendants' arguments relative to certain parts of attorney time which defendants say should be disallowed or reduced.

The contention that all work subsequent to November 30, 1976 should be disallowed has already been analyzed and rejected. It is enough to reiterate that defendants did not appeal or contest the November 30, 1976 Order and that all of the work done by plaintiffs' attorneys thereafter relative to the merits of the case was occasioned by defendants' renewal of the proceedings in this Court.

Defendants also argue that the time spent by plaintiff's attorney in work relating to former defendant Evelyn Falkowski ought to be disallowed because the present defendants should not be responsible for work relating to her. The time which defendants ask the Court to disallow on this theory consists of work in connection with the Falkowski appeal from the November 23, 1976 Order dropping her as a defendant, depositions of plaintiff and other EEOC personnel noticed by her during

the period she was in the case, and discussions with her counsel.[15]

The proposition relied on by defendants is that an award should be apportioned among multiple defendants and that one defendant should not be liable for work done with respect to other defendants. This proposition is sound in theory but without application to the facts of this case. No separate or different claim was asserted with respect to her. The allegation instead was that she was among those persons who have acted adversely to plaintiff. By 1976, it had become apparent that her presence as a defendant in the case was unnecessary and, in retrospect, that she need not have been joined as a defendant to begin with. However, that which was apparent in 1976 is not determinative of the appropriateness of her joinder at the outset of the case in 1975 when the full range of facts had yet to be developed.

In these circumstance, her presence in the case from 1975 to 1976 cannot accurately be divided into a separate and independent compartment and is accurately to be tre ed as an integral part of the case. For example, the Court has no doubt that defendants's attorneys reviewed plaintiff's depo-

sition noticed by Ms. Falkowski. Similarly, witnesses called by defendants at the 1978 hearings included persons whose depositions were taken by Ms. Falkowski during the time she had been in this case.

It is next contended that the amount of time spent in legal research for the preparation of the complaint in 1975 and the preparation of the complaint should be reduced by one-half.

Initially, it must be noted that while defendants say plaintiff's lead counsel had 24 hours in that work, the fact is that complaint preparation was only part of that 24 hours. The time in question consisted of the attorney's meeting with plaintiff, preparation of the complaint, preparation of plaintiff's first set of interrogatories to defendants, and preparation of plaintiff's first request for production of documents. The Court is satisfied that 24 hours was entirely reasonable for that work, particularly since the complaint was not a run-of-the mill pleading and since a review of the Court shows the interrogatories and document production request to have been extensive and the product of obviously painstaking work.

The contention advanced by defendants appears to be addressed primarily to 51 associate hours in legal research relative to the complaint and the preliminary injunction motion in 1975. It is certain that this associate time should be disallowed or at least sharply reduced if the institution of this lawsuit in 1975 has been guided by relatively settled precedent or if there had been no significant legal problems to be considered at the outset. But that was most assuredly not the situation.

The Court recalls the arguments of counsel in 1975 relative to significant legal questions relative to the maintainablility of the case, such as defendants' insistence that plaintiff was obligated to use internal admistrative remedies and defendants' additional contention that only in extraordinary circumstances may a Court look behind personnel actions taken by the Government. So also, briefs were filed with the Court by both plaintiff and defendants at the outset of the case, and without the legal research at that time, his lawsuit might have stumbled in leaving the starting blocks and fallen behind in the wake of the legal arguments presented by defendants. In the particular circumstances

of this case, the Court finds that this legal research time was reasonable.

It is next contended that time spent by associates in legal research relative to the legality and admissibility of a surreptitious tape recording should be reduced by one-half. The amount of time in that legal research (128 associate hours and 21 law student hours) is unquestionably high, but that research time must be viewed in the context of the unusual and complex questions on the subject. It entailed research into such questions as the effects of the defendants' attempted use of a tape recording made in violation of an EEOC Order and the admissibility vel non of the tape under the Omnibus Crime Control & Safe Street Act. A considerable amount of time and attention was given by the parties to this subject during the 1978 hearings, and the research done on the subject is reasonably to be regarded as having made a significant contribution to the logic and appealof plaintiff's arguments, with which the Court agreed. The Court will therefore allow the associate and law student time spent in this legal research.

Defendants next argue that plaintiff's lead counsel spent too much time in trial preparation for the 1978 hearings and that this trial pre-

paration time should be reduced.[16] The Court has given careful consideration to the difficult task of passing judgement on the reasonableness of an attorneys' trial preparation time and concludes that in the particular circumstances of the present case, the time devoted to such preparation was reasonable. The following points lead to this conlusion.

First, there is no suggestion that any of the time recorded by plaintiff's attorney might have been in the least inflated. On the contrary, it is undisputed that plaintiff's lead counsel actually had more time in the case than that which he recorded and for which compensation is requested, since he does not record time of less than 15 minutes a day.

Second, it was the Court's own experience as a trial lawyer that the thoroughness of trial preparation usually bore a direct relationship to the quality of performance in the courtroom. There is a genuine truth in the familiar adage that "you can overtry your case, but you can't overprepare it." In the present case, lead counsel was faced in 1978 with the task of saving the plaintiff's career from defendants' efforts to terminate his employment or (at a subesequent stage in the hearings) to transfer him to a position in Washington

where he would have been under the management of one of the individual deferdants. That counsel was able to save plaintiff from these results was in no way attributable to any failure of proof on the part of defendants' attorneys, who ably and forcefully presented evidence in support of defendants' position. It was instead attributable to the ability of plaintiff's attorney, obviously based on thorough trial preparation, to prove through the evidence that the personnel actions proposed by defendants were motivated by unlawful considerations.

The point may be illustrated by specific example. The evidence showing mistreatment of plaintiff was for the most part obtained by cross-examination of defendants' witnesses, and the success of that cross-examination in obtaining admissions from defendants' witnesses damaging to defendants' position was in substantial measure the product of counsel's obviously detailed knowlege of the contents of voluminous documents which were used in cross-examination to elicit reluctantly-given testimony from witnesses.[17] Similarly, disparate treatment of plaintiff was proven through the introduction of exhibits, prepared by his attorney from documents obtained from

defendants' files through discovery.

Having observed first-hand the performance of plaintiff's attorney at the 1978 hearings, the Court entertains not the slightest doubt that the quality of his representation of his plaintiff in the courtroom was attributable to the thoroughness of his trial preparation. The Court does not believe it would be fair or right to downgrade the amount of time he put into that thorough and productive trial preparation.

Third, there is another adage of legal folklore which has application in evaluating the reasonableness of trial preparation time. As the saying goes, "The secret of being a successful trial lawyer is simple. All you have to do is work on your case for five minutes longer than the lawyer on the other side." In this case, plaintiff's attorney faced formidable and capable counsel on the other side of the case. It was evident to the Court during the many days of the 1978 hearings that defendants' attorneys had devoted substantial attention and time to their trial preparation, and they too were outstanding advocates in the courtroom. Moreover, it should be noted that plaintiff's attorney tried the 1978 hearings by himself

(accompanied at times by a law student employed by his firm who, not being admitted to the bar, did not participate in the examination of witnesses), while defendants were represented by two lawyers throughout the hearings.

It is also in order to reiterate that the work performed by plaintiff's counsel in 1978 was made necessary by the action taken by defendants in filing a petition with the Court's decision in 1975 on the preliminary injunction issue, entered at a very early stage in this case, included the following comments:

"Having reviewed the complaint before the hearing, the Court carried the initial impression into the courtroom that Mr. Perry would have a difficult burden of proof to justify the issuance of a preliminary injunction against the reassignment of an official of an administrative agency. By the end of the day long hearing, the Court was firmly convinced that the evidence had overwhelmingly shown a flagrant mistreatment of a public servant of whose dedication and insistence upon quality workmanship were conceded even by the defendants and who clearly deserved commendation and not punishment for having

the courage of his convictions to speak out---." (400 F. Supp. at 420).

That was spoken in the context of the evidence presented at the preliminary injunction hearing and therefore was subject to being changed in light of additional or different evidence, but it nonetheless certainly gave notice of the reaction this Court had to the evidence establishing the flagrant mistreatment of a Government employee. The case could and should have been resolved internally at that point, with only a minimum expenditure of time by plaintiff's attorney. But as the evidence at the 1978 hearings convincingly showed, defendants instead pursued a course of continuing mistreatment of plaintiff, culminating in the issues which became the subject of the 1978 hearings. Indeed, the facts are that defendants reacted in an extremely negative fashion to the 1975 Opinion and treated it as an "embarassment" to be rectified by renewed efforts to remove the plaintiff because of his role in having initiated the lawsuit. In sum, the Court is not sympathetic with defendants' argument that plaintiff's attorney overprepared for the 1978 hearings when the plain fact of the matter is that none of this time would have been neces-

sary if defendants had not continued to mistreat the plaintiff. One of the most counter-productive of human emotions is a desire for revenge, and having indulged themselves in that emotion, defendants fairly be required to pay the price.

The final contention advanced by defendants relative to the time factor is that the time spent by lead counsel in collecting, reviewing, and indexing documentary materials in preparation for the hearings should be compensated at the lower $40 associate rate, the theory being that he should have delegated these tasks to associates or law students.[18] In urging this argument, defendants rely in particular on the explanation in lead counsel's affidavit that he prepared for examination of defendants' witnesses at the 1978 hearings by preparing a notebook indexing his two file drawers of documents and reviewing the notebook at every available opportunity "to try to memorize the documentary evidence and its source so relevant documents could be located as quickly as possible during the trial."

It is true enough that the task of merely collecting and indexing documents is a clerical function which should not command the services of a lawyer with 20 years' experience,

and the Court should not be understood as establishing any precedent for compensation at attorney rates for the performance of clerical functions. But in the context of the circumstances of this case, the Court believes defendants' argument misses the point of the documentary work performed by plaintiff's attorney. It was not the performance of a clerical function. Given the burden of proof faced by plaintiff's attorney during the 1978 hearings, it was essential for counsel to be able to elicit proof of mistreatment of the plaintiff through defendants' witnesses and defendants' documents. The achievement of this task was due in substantial measure to the ability of plaintiff's attorney to obtain testimony damaging to defendants' case by referring, with only minimal delay time, to relevant portions of documents. Anyone could have indexed, reviewed, and memorized the contents of the massive amount of documents in the courtoom during the hearings, but the Court is satisfied that the achieved goal of eliciting so much testimony from adverse witnesses could never have been realized had plaintiff's attorney not taken the time to become so familiar with the documents.

Turning now from consideration of defendants' arguments to the Court's own evaluation of the time and labor factor, the Court finds that the total amount of time for which compensation is sought is in this case reasonable. There are several considerations which deserve mention in this regard.

First, the time spent by lead counsel is without dispute less than his actual time, both because of the non-recording of time less than 15 minutes a day and because of the non-recording of discussions and conferences with other attorneys in his firm.

Second, this was an unusual case, containing a multitude of complexities and novel issues, which necessitated the preparation of briefs on these issues. Without counting the briefs filed by Ms. Falkowski, who was also getting in licks in opposition to plaintiff's position, this Court received a total of 13 briefs and memoranda from defendants and 7 from plaintiff.

Third, there should be a Peter Principle rule that the amount of work done by one attorney increases in relation to the amount of opposition emanating from the other side of the case. In the present case, in ingenuity and energy of defendants' counsel

asserted every conceivable procedural and substantive argument which could have been raised, and that in turn generated considerable work by plaintiff's attorney in surmounting those obstacles. [19]

An immediately obvious example is the fact that if plaintiff had not been able to overcome defendants' argument at the outset of the case in 1975 that his sole remedy was through an administrative procedure, he would no longer be holding his position in the agency. Similarly, defendants argued long and hard that Government employers have "the widest latitude" in what they do with their employees and that the Court therefore ought not to inquire into personnel actions taken with reference to plaintiff. There again, if plaintiff had not been able to overcome this argument, there is no doubt whatever that defendants would long ago have "had their way" with plaintiff.

Another example is that defendants' arguments were often asserted through multiple briefs and memoranda. For instance, plaintiff's motion for leave to amend his complaint in 1976 was met by defendants' memorandum in opposition to the requested leave to amend, then by defendants' supplemental memorandum in opposition to

leave to amend, then by defendant's supplemental memorandum in opposition to leave to amend, and then, after the Court granted leave to amend, by defendants' motion to dismiss the amended complaint on substantially the same grounds as had been asserted in the preceding memoranda.

Similarly, the records reflect, and the Court well recalls, defendants' determined opposition to the production of documents in response to Rule 34 discovery, accompanied by strongly-pressed assertions of privilege, and that in turn generated the filing by plaintiff of motions to compel and for sanctions and a hearing before the Court on the question.

Fourth, it should be reiterated in evaluating the time and labor factor that the evidence most damaging to defendants' case had to be obtained in substantial measure by plaintiff's attorney from defendants's witnesses and defendants' records, and it cannot be doubted that obtaining evidence from the opposition is a far more difficult and time-consuming task than presenting evidence through one's own witnesses.

(2) Novelty and difficult of the questions:

It is undisputed that this case has from

the first entailed novel and difficult issues, all of which were analyzed and argued by plaintiff's attorney in a highly professional and skillful manner. A review of the briefs filed with this Court at various times during the ligitation shows the following examples of issues of law which arose, were argued, and were resolved in plaintiff's favor: - Was plaintiff's exclusive remedy through an administrative proceeding?

- Is the Court empowered to inquire into the circumstances of Government personnel actions?

- Had plaintiff satisfied the procedural steps for the administrative handling of a Title VII charge against the Government so as to be entitled to amend his complaint to invoke Title VII?

- May a declaratory judgment proceeding be maintained with respect to issues allegedly committed for initial decision by the employing agency?

- Is a Court limited in reviewing administrative agency personnel actions to consideration of whether there has been compliance with procedural due process, the actions otherwise being immune from judicial review?

- Is a Court's judicial review of admini-

stative agency personnel action confined to determining whether the action was arbitrary?
- Are internal audit reports of EEOC offices (containing references to employee performance) priviledged and protected from discovery by the Privacy Act and under an exemption in the Freedom of Information Act?
- Is defendants' attempted use of a tape recording allowable under EEOC Order No. 165, the Omnibus Crime Control & Safe Streets Act, and the exclusionary rule?

The above do not represent an exhaustive list of the issues which arose in this Court. They should be adequate to illustrate the novelty and difficulty of the issues confronting plaintiff's attorney.

(3) Skill requisite to perform the legal services properly:

On the basis of the Court's first-hand observation of the attorney's work product, his preparation on both the facts and the law, and the ability displayed before the Court, the Court is satisfied that lawyer skills of a high rank were required for the proper representation of plaintiff and were in fact demonstrated by his attorney. Moreover, given the myriad of legal issues, and the persistence and productivity of defendants' counsel, it is highly probable that

any lesser degree of skill on plaintiff's side of the case would have been overwhelmed by the array of positions and theories advanced by defendants during the litigation.

(4) Preclusion of other employment by the attorney due to acceptance of the case:

Defendants argue that this factor weighs against an award in the amount requested because plaintiff's lead counsel did not turn down any work from other sources as a result of this case. The fact that this case did not preclude his acceptance of new work does not establish this case caused no work sacrifice. He notes this case did result in his turning over to associates work he otherwise would have done, resulting in lower bilings. Furthermore, there is no dispute that the performance of other work by plaintiff's attorney was required to be delayed because of the attention which had to be given to this case.

(5) Customary fee:

Defendants do not disagree with the rates requested for associates ($40) and law students ($20). The Court finds on the basis of the evidence in this case, and the Court's

knowledge of attorney rates in civil rights cases in this area, that the requested associate and law student rate are reasonable and customary.

It is argued by defendants that the $75 rate requested for plaintiff's lead counsel should be reduced to $50. Defendants base this argument on (a) the theory he spent too much time working on the case and (b) decisions in Title VII cases basing fee awards on a $50 rate. The excessive time contention has been discussed in connection with the time factor, paragraph (1) supra. The citation of $50 decisions is more aptly to be considered in connection with the awards in similar cases factor, paragraph (12), infra.

The Court finds that the requested $75 rate is a reasonable and customary charge for services by attorneys of comparable experience and skill during the period of time in which the services of plaintiff's lead counsel were performed and that a $50 rate would in the circumstances of this case be unconscionably inadequate. In making this determination, the following points have been considered:

First, the Court is personally familiar with the customary fee rates charged by attorneys in civil rights cases in this

area during the period of time involved in the present case. The $75 rate requested by plaintiff's attorney is not only reasonable but is conservative on the low side for a lawyer of national renown, which he is. This Court has in other civil rights cases been presented with evidence and arguments from attorneys of no greater skill and experience than plaintiff's attorney in support of $100 hourly rates.

Second, all the evidence before the Court in this fee petition proceeding substantiates the reasonableness of the $75 fee rate. Honorable Oscar W. Adams, Jr., formerly a leading civil rights attorney in this City and now Justice of the State Supreme Court, stated in his affidavit (filed prior to his appointment to the Supreme Court) that the requested hourly rates "are reasonable and are the customary rate for the representation of a plaintiff---." R. Lawrence Ashe, Jr. of the Atlanta bar states that the requested rates "are less than my firm charges clients in the Birmingham area for work done by comparably experienced attorneys" and points out that he received a fee award in 1977 based on an $80 rate in a case in the Northern District of Georgia in which he represented an EEOC employee in a suit against the agency.

(6) Whether the fee is fixed or contingent:

Relying on the statement in Johnson that "In no event --- should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount" (488 F.2d at 718), defendants argue that plaintiff's attorney took this case on a pro bono basis and that the requested fee should accordingly be reduced.

As has been true of so many of the arguments advanced by defendants during the course of this litigation, the argument shows the ingenuity of defendants' counsel. Starting with the premise that an award should not exceed the amount contracted for, they reason that the amount here contracted for was free pro bono legal services. Carried to its logical conclusion, the argument would mean that no fee at all should be awarded, but defendants do not take the argument to that conclusion and instead rely on this point for the argument that the requested fee should be reduced.

The conclusive answer to the argument is that there was not an agreement between plaintiff and his attorney that the repre-

sentation would be pro bono in the sense of any understanding that counsel would receive no compensation through a fee award. It was pro bono only in the sense that counsel agreed he would represent plaintiff without charging plaintiff a fee and instead would seek compensation through a fee award. Specifically, the circumstances were that plaintiff's attorney agreed to accept the representation without charging plaintiff a fee, the understanding having been that he instead would seek a fee award from defendants. That is the normal and customary contingent fee method of plaintiff representation in civil rights cases, and defendants' pro bono argument is accordingly inapplicable.

(7) Time limitations imposed by the client or circumstances:

The circumstances of this case imposed significant time constraints on plaintiff's attorney in several respects, as illustrated by the preparation of the initial pleadings and discovery in the face of the deadline set for plaintiff's reassignment, the preparation of briefs in response to the numerous positions taken by defendants, and responding to the numerous petitions and motions filed by defendants.

(8) Amount involved and result obtained:

Defendants suggest that this is a relatively unimportant case, since it entailed no monetary recovery or class-wide relief, and that the amount of rhe requested award is disproportionate to the importance of the case. The Court thoroughly disagrees with defendants' view of the importance of the case.

First, defendants' argument impresses the Court as implicitly conveying the message that this was nothing more than an internal employment dispute unworthy of a substantial fee award. The argument is in this respect a reappearance of the position, taken at the outset of the case, that the Courts have no right to "interfere" with the way a Government agency handles personnel actions with its employees. The fact that plaintiff was able to overcome that initial defense raised by defendants reflects, in the Court's opinion, one aspect of the importance of the case in contributing to the consideration, expressed by Judge Goldberg in Porter v. Califano, Supra, that "In recent years, Congress and the courts have come a long way in expanding and fortifying those [constitutional and statutory] rights and

in conferring on public employees citizenship of the first class."

Second, the result acheived by this litigation saved the career of a senior civil servant who had served the Government with distinction and high praise. This saving of his career has an importance which far transcends the significance of the result to plaintiff himself, because, by retaining the services of a dedicated and efficient EEOC manager, it as well benefitted the citizens for whose protection Congress created the EEOC.

Third, the Court is convinced that this litigation will produce the immeasurable benefit of protecting other Government employees from the high-handed treatment accorded this plaintiff. It is with considerable reluctance that the Court comments on defendants' actions in this case, because the Court is all too well aware that the Court's 1975 decision had the effect, not of inducing defendants to reconsider their attitude toward plaintiff, but rather of adding fuel to the flames of their efforts to silence and punish him. The Court is concerned that any comments in this Opinion might generate still another flare-up of defendants' attitude and therefore is con-

strained to use mild terms in describing defendents' actions. Even characterized in mild terms, it must be said that this lawsuit has produced the significant benefit of revealing retaliatory and discriminatory treatment of a Government officer and of serving notice that Government employees may not be treated as chattels to be removed or moved because of their exercise of their civil rights and their Constitutional rights.

(9) Experience, reputation, ability of the attorneys:

No disagreement is expressed by defendants with regard to this factor. Plaintiff's lead counsel has been a member of the bar since 1959, specializing in labor law, is a member of EEO law committees, is the author of law review articles on Title VII law, and has been a speaker at numerous EEO seminars. He is nationally recognized as one of the best EEO lawyers in the United States.

(10) Undesirability of the case:

This was not an attractive case for counsel to take. It has been undisputed from the outset that prominent civil rights plaintiffs' attorneys could not take the case because of concern that to do so might jeopardize their relationship with EEOC. It

is further undisputed that an Atlanta management attorney turned down the case, in part because of the unattractive financial nature of the representation.

(11) Nature and length of the professional relationship with the client:

This case is the only occasion on which plaintiff's attorney has represented plaintiff.

(12) Awared in similar cases:

Defendants place considerable reliance on their citation of civil rights cases basing awards on rates from $30 to $50 and argue that "The hourly rate requested by plaintiff is excessive when compared to awards by district courts in this Circuit and, thus, should be lowered."

The Court does not believe there is any rule or prevailing opinion among the District Courts in the Fifth Circuit to the effect that awards should necessarily be based on a $30 to $50 rate range. It may be noted, for example, that defendants' citation of cases omitted Judge Moye's decision in the Northern District of Georgia rendering an award based on an $80 partner rate to an EEOC employee who had sued the agency for alleged employment discrimination. See also Neely v. City of Grenada, 624 F.2d 547

(5th Cir. 1980) ("we hold that a fee based on $100 per hour is reasonable.").

Similarly, by having considered fee petitions in other cases, the Court is aware that decisions awarding fees on the basis of rates above the $30-50 range are equally available for citation

No useful purpose would be served by extended consideration of the subject. Suffice it to say that the Court considers the requested fee to be well in line with awards in civil rights cases and an entirely reasonable fee for the services performed in this particular and unique case.

B. REASONS FOR THE COURT'S DECISION AS TO FEE AMOUNT:

Having analyzed the case in light of the Johnson factors, it is now incumbent on the Court to articulate the reasons for its decision as to the amount of a fair and reasonable fee award. Cooper Liquor, Inc. v. Adolph Coors Co., 624 F.2d (Fifth Cir. 1980). In conformity with the views there expressed by the Court of Appeals, the Court pays special attention to factors, 1 (time and labor required), 5 (customary fee), 8 (amount involved and result obtained, and 9 (experience, reputation, and ability of the attor-

neys).

The Court starts with the lodestar method, consisting of an objective measurement based on the number of reasonably-incurred hours (factor 1) multiplied by a reasonable and customary hourly rate (factor 5). The Courts finds that the amount of time incurred by plaintiffs' attorneys was reasonable and necessarily incurred for the representation of plaintiff in the significant and demanding circumstances of this case. The Court similarly finds that the amount of the hourly rate requested is customary and, with respect to plaintiff's counsel, on the conservative side. It is therefore decided that the lodestar method restuls in a reasonable fee in the amount sought by plaintiff.

The lodestar fee is then to be adjusted upward or downward in accordance with the other factors in the Johnson compilation, with particular emphasis on factors 8 and 9. Cooper Liquor, Inc. v. Adlph Coors Co., supra.

In this case, the Court finds that on the one hand, none of the other factors would call for a downward adjustment of the lodestar fee. With particular reference to factor 8 (amount payed and result obtained), this lawsuit not only saved plaintiff's

distinguished career but as well achieved the significant result of preventing defendants from mistreating a public servant who had the courage of his convictions to act on the belief that a black citizen can criticize a Government agency and white officials. With particular reference to factor 9 (experience, reputation, ability of the attorneys), the Court finds that for a comparably skilled handling of a case for a paying client, plaintiff's attorney could have commanded an equal or even higher fee than here requested.

However, since plaintiff has not requested any amount in excess of the lodestar fee,[20] the Court will not make any upward adjustment. The fact that the fee requested is less than it justifiably could be by upward adjustment provides additional support for the Court's conclusion that the amount of the requested fee is entirely reasonable.

CONCLUSION

On the basis of the facts and authorities which have been set forth in this Opinion, the Court concludes as follows:

1. Plaintiff is entitled to an award of costs, including attorneys' fees, under Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended [42 U.S.C. §2000e-

5(k)] and, in addition and alternatively, under the Civil Rights Attorneys Fees Awards Act of 1976 [42 U.S.C. §1988].

2. Evaluated in the context of the circumstances of this case, and the factors expressed in Johnson v. Georgia Highway Express, supra, the amount of the attorneys' fee requested by plaintiff is fair and reasonable.

3. Plaintiff is accordingly entitled to an award of costs, covering the period from August 15, 1975 through November 24, 1980, consisting of an attorneys' fee award in the amount of $96,650 and expenses in the amount of $2681.90, for a total of $99,331.90.

An Order in conformity with this Opinion will be entered.

This the 16th day of December, 1980.

/s/ G. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE

FOOTNOTES

1. The court also heard a petition for attorneys' fees and costs by Evelyn Falkowski, who was one of the defendants in this case until 1976. She seeks an award of fees and costs against the Equal Employment Opportunity Commission (EEOC) as a co-defendant

(before 1976) in this case and as plaintiff in a lawsuit she filed against the EEOC. Her petition is appropriately to be resolved separately and in the context of her lawsuit rather than in this case to which she has not been a party since 1976.

2. It should be noted that the Court's 1975 Opinion in no way found any improper conduct on her part. The references in the Opinion to which she objected were simply based on the undisputed testimony of her then agency superior as to what he had concluded. Moreover, the Court was careful to point out that:

> "It should be noted that the Court is not passing on the propriety or impropriety of the District Director's actions.--- Nothing said in this case should preclude the District Director from contending or attempting to show that the Regional Director's findings were in error." (400 F. Supp. at 411).

3. Her notice of appeal, filed on February 14, 1977, stated in full text as follows:

"Notice is hereby given that the Defendant Evelyn Falkowski hereby appeals to the United States Court of Appeals for the Fifth

Circuit from the final judgment entered in this action on 23 November 1977 [sic - 1976] (a motion to reconsider the dismissal having been overruled on 14 January 1977)."

4. The Court of Appeals' July 1979 Opinion stated that "the EEOC had filed an appeal from the earlier order". It is undisputed, however, that the EEOC filed no appeal from any Order in this case in 1976 and that the only appeal in 1976 was the Falkowski appeal from the November 23, 1976 Order dropping her as a defendant. 5. The only exception will be certain contentions which are more logically to be considered in connection with analysis of the 12 factors set forth in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) for evaluation of the amount of fee awards.

6. It is undisputed that the appeal from the Order dropping Ms. Falkowski as a defendant did not bring before the Court of Appeals the subsequent unappealed Order of November 30, 1976. E.g., 28 U.S.C. §§2106 and 2107; Cole v. Tuttle', 540 F.2d 206 (5th Cir. 1976); Elfman Motors v. Chrysler Corp., 567 F. 2d 1252 (3rd Cir. 1977); Symons v. Mueller Co. 526 F. 2d 13 (10th Cir. 1975).

7. It should be reiterated in the interest of clarity that in fact the dismissal was in

her case, not in this case.

8. Section 706(k), 42 U.S.C. §2000e-5(k), provides that:

"In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

9. The 1976 statute provides as follows:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Since this case filed in 1975 was pending when the Civil Rights Attorneys Fees Awards Act was enacted in 1976, the Act applies retroactively to the inception of the case. Miller v. Carson, 563 F.2d 741 (5th Cir.

1977); Gore v. Turner, 563 F.2d 159 (5th Cir. 1977); Rainey v. Jackson State College, 551 F. 2d 672 (5th Cir. 1977).

10. A footnote in defendants' original opposition to the fee petition suggested that an award under the 1976 Act (but not under Title VII) would be barred by the sovereign immunity of the Federal Government. The suggestion was evidently dropped, as it went unmentioned in all succeeding phases of the proceeding. In any event, the point is not of material significance in this case, because the only defendant here which could claim the protection of sovereign immunity would be the EEOC. The other defendants, sued in their individual capacities, could not do so.

11. 42 U.S.C. §2000e-5(k) and 42 U.S.C. §1988.

12. These hours were through November 24, 1980. Plaintiff's attorney stated at the hearing that he was not asking for any fee for the day of the hearing on November 26, 1980.

13. Expenses in the amount of $2,681.90 are also sought. There is no dispute with any of the expense items requested. The total amount sought is computed as follows:

1094 partner hours x	$75	=	$82,050
276 associate hours x	$40	=	11,040
178 law student hours x	$20	=	3,560
Total fee requested			96,650
Expenses			2,681.90
Total			$99,331.90

14. For example, the Senate Report on the Civil Rights Attorneys Fees Awards Act referred to in the Fifth Circuit's decision in Johnson as setting forth the appropriate standards to be applied in the evaluation of fee requests. Senate Report No. 94-1011, 5 U.S.Code Cong. and Adm. News, 94th Cong., 2d Sess. (1976), page 5913. See also Hameed v. International Association of Bridge, Structural & Ornamental Iron Workers, 24 FEP 352 (8th Cir. 1980) ("This Court remands this case to the district court so that attorney's fees may be determined in accordance with the guidelines set forth by the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714, 717-19 (5th Cir. 1974)."

15. A breakdown of services by subject matter, prepared by plaintiff and introduced at the hearing, shows that the work relating to Ms. Falkowski is as follows:

Depositions - 31 partner hours and 10-1/2 associate hours.

Discusssions with her attorney - 2-1/4 partner hours.

Brief and oral argument in the Fifth Circuit - 126 partner hours.

This results in a total of 159-1/4 partner hours and 10-1/2 associate hours. Defendants also contend that 15 hours in reviewing affidavits and documents in August and September 1975 "generally dealt with matters raised by defendant Falkowski" but there is no evidence before the Court to that effect.

16. Plaintiff's exhibit breaking down the hours by subject matter shows a total of 350 partner hours and 38 law student hours in connection with the 1978 hearings, consisting of both preparation time and trial time. According to defendants' calculations, 269 of the partner hours consisted of preparation time, which defendnts say should be reduced from 269 to 160 hours.

17. The use by plaintiff's attorney of documents is illustrated by the following cross-examination of one of defendnts' witnesses:

"Q Would it be fair to state, Mr. Nelson, that in fact, Mr. Russell did not have permission from you to speak to Mr. Perry on that date?

A. No, it would not.---

Q. Is it not a fact, Mr. Nelson, that Mr. Russell did not obtain your permission to speak with Deputy Bertram Perry on that occasion?

A. I cannot say that he did not have my permission per se. I can say I did not say, 'Ed, you may go up and speak to the Deputy.' I did not say that, but I did not object to it.

Q. Is it not a fact that you advised Mr. Perry in writing as follows: 'You inquired if Mr. Russell obtained my permission to speak with you and the answer is no.'?

A. That is correct."

18. The breakdown of time by subject matter shows, for review of documents and files, 88 partner hours, 8 associate hours, and 27 law student hours. It may also be assumed that part of the trial preparation time in 1978 consisted of repeat reviews of documents.

19. Defendants were certainly entitled to assert the arguments. The point is not intended as any criticism of defendants but rather to illustrate that the greater the opposition, the grater must be the responsive work.

20. The fee petition, as filed in 1978, requested an increase in the form of a bonus, but at the hearing on November 26, 1980, plaintiff's attorney stated that only a fee based on hours and hourly rates was being requested.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHRN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Filed
Feb 13, 1981
Entered
Feb 17, 1981

EVELYN FALKOWSKI. Plaintiff	)	
vs.	)	
LOWELL PERRY, CHAIRMAN U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION et als.	)	CIVIL ACTION No. 76-G-0545-S
Defendants	)	

MEMORANDUM OPINION ON PLAINTIFF'S PETITION FOR AWARD OF COSTS AND ATTORNEYS' FEES

Plaintiff, who at the time was Director of the Birmingham District Office (BIDO) of the Equal Employment Opportunity Commission (EEOC), filed this lawsuit on April 19, 1976 against the EEOC, the members of the EEOC, and various EEOC officials. On August 1, 1980 she filed a petition for award of costs and attorneys' fees against the EEOC. A hearing on such petition was held on November 26, 1980. At the hearing, the Court orally expressed its conclusion regarding the extent of the plaintiff's fee entitlement. The

plaintiff, dissatisfied with the Court's opinion as expressed at the hearing, thereafter filed a petition with the Court of Appeals for a writ of mandamus or prohibition, which was denied by the Court of Appeals on December 16, 1980.[1]

The plaintiff's petition for writ of mandamus or prohibition included an allegation of bias on the part of the Court toward the plaintiff. It did not purport to be a motion under 28 U.S.C.§144 or §455, and it was in any event presented to the Court of Appeals and not to this Court. Nevertheless, the Court deems it appropriate to point out that the allegation would have been without substance for at least two reasons.[2] First, the appropriate time for the plaintiff to have asserted such an allegation would have been prior to the fee petition hearing at which the Court orally expressed its conclusion regarding her fee entitlement, rather than waiting until after the Court had expressed its conclusion. Since the Court had already announced its decision on her attorneys' fee petition before the allegation was asserted in the mandamus-prohibition petition she filed with the Court of Appeals, it clearly was a post-

decision effort to challenge the conclusion reached by the Court. Second, the allegation was based, not on any extra-judicial ground, but on the Court's opinion in an earlier phase of the case.[3]

The Court will therefore proceed with the entry of this Memorandum Opinion confirming the conclusion which it expressed at the hearing.

FILING AND PENDENCY OF THE LAWSUIT

The facts relative to the background, institution, and pendency of this case are as follows:

1. In 1973, the plaintiff filed a lawsuit against the EEOC, as her employer, alleging discrimination against her because of her sex in not awarding or assigning her to the position of Director of the BIDO. (Evelyn Falkowski v. John Powell, as Chairman of the Equal Employment Opportunity Commission, Civil Action No. 73-P-1009-S). That case, which was before Judge Pointer of this Court, was resolved by a consent decree, entered on September 9, 1974, under which the EEOC agreed that if an opening occurred in BIDO, the plaintiff's application would be considered "in a very favorable light." Shortly thereafter, in

November 1974, the plaintiff became Director of BIDO.

2. On July 1, 1975, the EEOC (through the then Regional Director of the Atlanta Region) withdrew the plaintiff's authority as BIDO Director, so that while she remained in the job, she was not authorized to exercise the responsibilities of the position.

3. On August 15, 1975, the EEOC (again through the Director of the Atlanta Region) gave the plaintiff notice of reassignment from her position as BIDO Director. Through counsel retained by her, she presented[4] a pleading to Judge Pointer alleging that such reassignment constituted a violation of the 1974 consent decree in Civil Action No. 73-P-1009-S.

4. That pleading which she filed in 1975 with Judge Pointer did not result in any judicial action because she obtained the result she sought of remaining in the BIDO Director job through a "tag-along" on a preliminary injunction which this Court had entered in a case filed by the BIDO Deputy Director.[5] She was not named as a protected party in such preliminary injunction. but the EEOC informally agreed, in the case she had before Judge Pointer, that her then

proposed reassignment would not be implemented. In return for such agreement on the part of EEOC, she withdrew the pleading she had presented to Judge Pointer alleging that the reassignment constituted a violation of the 1974 consent decree in her case. That marked the end of her 1973 lawsuit and of the pleading she presented in that case to Judge Pointer in 1975.[6]

5. This action (the Falkowski case) was filed on April 19, 1976. Named as defendants were the EEOC (through its then Chairperson Lowell Perry), the members of the EEOC (in their official and individual capacities (B. G. Mathis, Executive Director; Alvin Golub, Deputy Executive Director, Donald Muse, Director of Field Operations; Donald L. Hollowell, former Director of the Atlanta Region and then Assistant General Counsel, and G. Duke Beasley, Acting Director of the Atlanta Region). The complaint was based substantively on Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e et seq.), Sections 1981, 1983, and 1985 of Title 42 of the United States Code, and an Executive Order. The complaint alleged, in substance, that the defendants were retaliating against her because of her filing of her 1973 lawsuit which resulted

in the consent decree by which she obtained the BIDO Director job and were discriminating against her because of her race/sex (white female). The alleged acts by defendants complained of in the complaint consisted in essence of having withdrawn her authority as BIDO Director, appointing a defendant (G. Duke Beasley) as Acting BIDO Director, hiring employees for BIDO without her involvement in the hiring process, refusing and failing to provide her with administrative support and conspiring to undermine her authority and place her in an unfavorable light.

6. The case originally was assigned to Judge Pointer. It appears that this was was simply a "luck of the draw" assignment having no connection with Judge Pointer's handling of her 1973 lawsuit or the pleading she presented to him in 1975.

7. The Court file reflects that the plaintiff sought, contemporarneously with the filing of the complaint, a temporary restraining order enjoining defendants from hiring anyone for BIDO without her involvement. The Court file also reflects that Judge Pointer treated her TRO motion as a motion for preliminary injunction, held a hearing on it on April 20, 1976, and on the

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same day entered an Order denying the plaintiff's motion.

8. The case thereafter was reassigned to the undersigned Judge.

9. The defendants moved to dismiss the complaint on the ground of, inter alia, mootness. In the course of the arguments before the Court on such motion, it was established that the plaintiff's full authority had been restored to her on May 3, 1976 (shortly after the filing of this lawsuit) and that she was continuing to exercise her full authority as BIDO Director. It was therefore clear that the case was moot.

10. Accordingly, on November 30, 1976, the Court entered an Order finding "that there is no existing substantial controversy between the parties, and that the cause has become moot" and dismissing the complaint, with the exception of one aspect, which is of no significance to the present attorneys' fee question.[7] The Court also noted in this Order on Nvember 30, 1976 that "there is no suggestion of any reasonable grounds to apprehend a resumption of the acts of which the plaintiff complained in her complaint---."

11. The plaintiff thereafter filed a motion asking the Court to provide for judi-

cial review of any proposal to remove her, and the Court acceded to the Plaintiff's request by Order entered on April 1, 1977 amending the November 30, 1976 Order to provide for such review.

12. The plaintiff took an appeal to the Court of Appeals from the Order entered on November 30, 1976 holding that the case was moot. The plaintiff's contention on appeal was that her case was not moot. On April 5, 1979, the Court of Appeals rejected her argument and held that this Court correctly dismissed on account of mootness, but that since the case was moot, it was beyond the Court's authority to have entered the amendment in 1977 requested by the plaintiff to provide for review of any proposal to remove her from the BIDC Director proposal.

13. While her appeal was pending, and before the Court of Appeals' decision in April 1979, the EEOC filed a petition with the Court seeking approval of a proposal to discharge the plaintiff from employment with the EEOC. During evidentiary hearings in 1978 on that petition, the proposed discharge was modified by the EEOC to a transfer, this modification being in response to an informal suggestion by the Court. Following completion of the evidentiary

hearings, the Court held, on November 21, 1978, that EEOC's proposal was not discriminatory or retaliatory. On an appeal from that ruling, the Court of Appeals held, on July 25, 1979, that since its April 1979 ruling had held this Court should not have provided for review of a proposed removal because of the mootness of the case, this Court's November 1978 decision was due to be vacated.

14. The plaintiff thereafter transferred from the BIDO Director position to another position with the EEOC in Washington, D. C. Whether her transfer was voluntary or involuntary is in dispute. At the attorneys' fee hearing on November 26, 1980 EEOC counsel stated that she transferred voluntarily, while plaintiff's counsel stated his understanding as being that she was transferred involuntarily. The Court accepts as entirely sincere these conflicting representations of counsel. Unfortunately, no evidence was presented to the Court at the hearing relative to whether her transfer was voluntary or involuntary. It is therefore necessary for the Court to resolve the question on the basis of logic in light of the Court's familiarity with

the underlying circumstances. It does not seem logical to the Court that after having filed suit in 1973 to obtain the BIDO Director job, the plaintiff would have voluntarily transferred to another position, particularly since the EEOC does not contend the transfer to Washington was in any sense a promotion or an advancement for her. The Court accordingly concludes that the plaintiff was transferred involuntarily.

EXTENT (IF ANY) TO WHICH THE PLAINTIFF MAY BE CONSIDERED THE PREVAILING PARTY

The plaintiff seeks an attorneys' fee and costs award under Secation 706(k) of Title VII of the Civil Rights Act [42 USC §2000e-5(k)] and the Civil Rights Attorneys' Fees Awards Act [42 U.S.C. §1981], both of which authorize such awards to the "prevailing party." The primary focus of the contentions relative to her attorneys' fee petition is whether she to any extent was a prevailing party. It is therefore necessary to determine the extent to which the plaintiff might be considered the prevailing party. The following are the various aspects of the question.

1. The fact that she was not reassigned in 1975:

The plaintiff was successful in avoiding

reassignment in 1975 by reason of the EEOC's agreement not to act on the "detail" reassignment. But this Court cannot award any attorneys' fees or costs to her in this case on the basis of that fact. The consent decree in her 1973 lawsuit had been entered by Judge Pointer, and the pleading she presented in 1975 alleging her reassignment constituted a violation of the consent decree was similarly before Judge Pointer. Any request for a fee and costs award based on the events in 1975 should therefore have been presented to Judge Pointer.

2. Restoration of plaintiff's authority on May 3, 1976:

The plaintiff's strongest point for prevailing party status is that subsequent to the filing of her complaint in this case on April 19, 1976, the EEOC restored her authority to her on May 3, 1976. The question is whether, as a matter of the facts, the filing of her lawsuit acted as a catalyst to the restoration of her authority or whether the EEOC would have restored her authority on May 3, 1976 if the lawsuit had not been filed.

The parties have not favored the Court with much in the way of evidence on the subject. On the one hand, the plaintiff relies on the contention, as expressed by her coun-

sel, that "since the restoration [of her authority] took place only after Falkowski v. Lowell Perry was filed, reasonable persons would presume it was done for the purpose of mitigating its liability for the wrongful recision [sic]." On the other hand, the EEOC likewise relies on the assertions of counsel rather than on evidence. It is argued on behalf of the EEOC that there was no causal realtion between the filing of her lawsuit and the restoration of her authority and that the fact that her authority was restored on the heels of the filing of her suit was a coincidence. Specifically, it was the EEOC's position at the November 26, 1980 hearing that the restoration of her authority came about because the then Acting Chairperson of the EEOC (Ms. Ethel Bent Walsh) was attempting to resolve the problem amicably. It must be noted, however, that the EEOC's position expressed in an earlier-filed brief was that her authority was restored because it was determined that the Regional Office was not authorized to have withdrawn it.

The Court is persuaded that the filing of her lawsuit on April 19, 1976 had a causal connection with the restoration of her authority on May 3, 1976. In reaching this con-

clusion, the Court has considered the following:

First, the Court does not subscribe to plaintiff's contention that the timing of the EEOC's action in restoring her authority necessarily raises a presumption that it was motivated by the filing of her lawsuit, but the Court does agree that the restoration of her authority within two weeks after she filed this lawsuit is inferential evidence of a causal connection.

Second, it may be that the EEOC could have dispelled the inference of a causal connection by introducing evidence explaining the timing of the restoration of her authority, but no such evidence was offered. Assuming arguendo that her authority was restored because of a desire to resolve the problem amicably, the Court has been provided with no evidence which might explain the reason this action was taken two weeks after she filed the lawsuit rather than before she filed the lawsuit.

Third, the circumstance that the EEOC has stated different versions of the reason for the restoration of her authority raises doubt as to the soundness of at least one of the alleged reasons.

Fourth, to the extent that the restoration of her authority was attributable to a desire on the part of the EEOC to resolve the situation amicably, the Court considers it probable that at least part of the "situation" which the EEOC desired to resolve was the plaintiff's lawsuit.

The Court therefore finds that the filing of the plaintiff's lawsuit on April 19, 1976 acted as a causal impetus to the restoration of her authority on May 3, 1976 and that she was to this extent the prevailing party.

3. Retention of her position and authority after May 3, 1976:

The next question is whether the plaintiff may be considered the prevailing party in her lawsuit subsequent to the restoration of her authority on May 3, 1976.

The Court's November 30, 1976 Order recited that "It is undisputed that at the present and at all times since May 3, 1976, the plaintff has been and is fully exercising the full authority of her position as District Director of the Birmingham District Office and that she is not being subjected to any alleged harassment." The Court recognizes the plaintiff subsequently contested those facts, but the Court would not have said the facts were undisputed if

such had not been the case, and in any event, the dismissal of her action on account of mootness was affirmed by the Court of Appeals. The present question is whether this 1976 finding by the Court, which she then contested, can now be turned to her advantage on the theory that the pendency of her lawsuit may have played a causal role in the continuation of the situation subsequent to May 3, 1976 of her retaining her position and the full authority of such position.

The answer, on the record before the Court, must be in the negative. It is possible to speculate that the pendency of her lawsuit might have been a causal factor in the continuation of her authority, but the Court cannot decide issues on the basis of speculation alone. The plaintiff has neither presented the Court with any evidence, nor called the Court's attention to anything in the record, which could arguably support a finding that the continuation of her authority was to any degree influenced by her lawsuit. For aught that appears in the record, she continued to retain her position and her authority after it was restored to her on May 3, 1976 simply because the EEOC concluded, without being influenced in any

way by her lawsuit, that she should continue to hold that position and authority. The Court therefore must find that the continuation of her authority after it was restored on May 3, 1976 was not attributable to the pendency of this case.

4. Provision for review of proposed removal from her position:

The plaintiff argues that she became the prevailing party by reason of the Court's November 30, 1976 Order (as modified by the amendment entered on April 1, 1977) having provided for review of any proposal by the EEOC to remove her. The result, according to the plaintiff's argument, is that she is due to be accorded prevailing party status until her involuntary transfer from her position following the Court of Appeals' decisions in 1979.

In urging this view, the plaintiff relies on a colloquy between the Court and one of her then attorneys in 1978. Referring to the November 30, 1976 Order, the plaintiff's attorney asked the Court, "Is it your understanding of your November 30, I think it was, order--November 1976 Order, that that terminated the litigation except for the retention of jurisdiction and it terminated it favorably to Ms. Falkowski?' The Court's

affirmative answer to counsel's question is now cited by the plaintiff for the contention that "This court has already acknowledged that Mrs. Falkowski is a previling party against EEOC through the proceedings that resulted in this court's decision of November 30, 1976."

The Court cannot accept the interpretation which the plaintiff places on the Court's answer to her then attorney's question. For one thing, it was in no sense a finding of fact and was instead simply part of an informal discussion with counsel on subjects not related to attorneys' fees. Only after the Court answered counsel's question did the attorney indicate he had attorneys' fees on his mind. It would clearly be unfair to the EEOC to take a casual discussion in the courtroom as a conclusive establishment of prevailing party status.

Furthermore, the Court's view that the November 30, 1976 Order (as amended by the April 1, 1977 Order) constituted a favorable termination of the case from her standpoint plainly had reference to the review provision added to the November 30, 1976 Order by the April 1, 1977 amendment. The plaintiff's present argument that the Court had reference to the November 30, 1976 Order

without the subsequent amendment is totally without merit. Contrary to the plaintiff's argument, the facts are that the plaintiff appealed the November 30, 1976 Order on the ground that the Court should not have held her case was moot. The only aspect of the Order which was favorable to her was the amendment providing for review of any proposed removal of her, and she herself brought about the vacating of that provision by her appeal to the Court of Appeals.

The sum of it is that the plaintiff's present contention that she became the prevailing party by reason of the 1976 Order is patently inconsistent with the plaintiff's action if having contested the 1976 Order by the appeal she took to the Court of Appeals. This Court is unable to arrive at a rational ground on which to reconcile her present position that the 1976 Order conferred prevailing party status on her with her position in the appellate court that the same Order was erroneous and should not have been entered. Every Judge is accustomed to alternative arguments and changes in the position taken by litigants, but the conflict between the plaintiff's position in this Court and the plaintiffs position in the Court of Appeals is too direct and irreconcilable for thie Court to disregard.

It is arguable that the provision for review of a proposed removal, entered by the 1977 amendment, had the effect of delaying the plaintiff's removal from the BIDO Director job and that she should be accorded prevailing party status until she was removed. The defect in any such theory is that the plaintiff was not entitled to the provision. The fact that it was given to her by the Court was purely and simply a case of the Court having overextended considerations of facial fairness. A review provision had been entered in an unappealed Order in the Perry case in the context of a lawsuit with a different background and basis and because the factual record before the Court in the Perry case established that there were reasonable grounds to apprehend a renewal of efforts to silence and punish him. The situation in the Falkowski lawsuit was entirely different, both because her lawsuit was based on different background and theory and because there was not so much as any suggestion of any potential of a renewal of any allegedly unlawful acts in her case. As the Court pointed out in the Order entered on November 30, 1976 in the Falkowski case, "there is no suggestion of any reasonable grounds to apprehend a resumption of the acts

of which the plaintiff complained in her complaint---."

It was thus obvious that the case should have ended at that point. The fact that the Court thereafter acceded to the plaintiff's contention that"it won't do any harm" to give her a review provision does not alter the point that there were no factual grounds in her case entitling her to such a provision and that it was a gratuity which should not have been given her.

Finally, if it is assumed arguendo that the proceedings held pursuant to the review provision may be considered for purposes of determining prevailing party status, the relevant fact is that the Court found nothing improper in the EEOC's proposal to remove her from the BIDO Director position.

5. Appellate proceedings:

The EEOC is clearly correct in saying the plaintiff could not be considered to have been a prevailing party at the appellate level. Her theory is that she became the prevailing party in this Court by reason of this Court's November 30 1976 Order, that this Order was affirmed by the Court of Appeals, and that she therefore was the prevailing party in the Court of Appeals. The theory is factu-

ally erroneous for the following reasons:

First, the argument is a repitition of her contention (discussed in Section 4, supra) that the November 30, 1976 Order constituted a termination of the case favorable to her. It is sufficient to reiterate that the only favorable aspect of the Order was the review provision added by amendment, which was not affirmed.

Second, the aspect of the November 30, 1976 Order which was affirmed by the Court of Appeals was the dismissal on account of mootness, which the plaintiff challenged on appeal. Since the contention she urged on appeal was rejected, she obviously cannot be regarded as the prevailing party.

Third, the irony of it all is that she came back from the Court of Appeals in worse shape than she was in before she appealed. She appealed to challenge this Court's finding in the November 30, 1976 Order that her case was moot. Her appeal resulted in an affirmance of that disposition. At the same time her appeal also resulted in a vacting by the Court of Appeals of the review provision which this Court had given to her although she was not entitled to it on the factual situation in her case.

6. Modification of discharge to involuntary transfer:

While not argued by the plaintiff, the Court has given her the benefit of every conceivable argument by considering whether she might be regarded as having prevailed, in the sense of avoiding a termination of her employment, by reason of the EEOC's modification of the originally-proposed discharge to a transfer. The Court has concluded, in answer to its own question, that the circumstances under which the modification was made do not warrant prevailing party status.

It came about because the Court, in the course of discussing the case with all counsel, suggested that a transfer might be a more desirable solution from the EEOC's standpoint than discharge, and in response to that thought, the EEOC did modify the proposed action to transfer. If the Court had made this suggestion because of evidence indicating that discharge might be unlawful, it could be reasonably said that she prevailed by avoiding discharge. But the facts are otherwise. On the contrary, the Court found that the EEOC's proposal was not improper. The Court's suggestion that the EEOC might consider transfer in lieu of discharge

was based on nothing more than the practical consideration that a transfer would avoid the more damaging result of discharge. Similarly, since the EEOC modified the discharge, not because of any evidence she presented, but simply to accommodate itself to the Court's suggestion, it would be unfair to the EEOC to treat that modification as giving prevailing party status to her.

7. Contention that she was a prevailing party against the EEOC as co-defendant in the Perry case.

The plaintiff's final contention is that she should be accorded prevailing party status as against the EEOC as co-defendant in the Perry case. This subject will be resolved solely in the context of her lawsuit (the Falkowski case) and not in the context of the Perry case because she has not been a party to the Perry case since 1976 and therefore lacks standing to seek any result in that case. So also, since all her contentions relative to fee entitlement are being considered and decided in this Opinion in her case, any appeal she might take should be in this case and not in the Perry case.

The initial question in considering her request for an attorneys' fee and costs award

against the EEOC as co-defendant in the Perry case is whether such request is timely. She was a defendant in the Perry case from the time it was filed on August 18, 1975 until she was dismissed as a defendant on November 23, 1976. She has not been a party to the Perry case since then. Since the filing of her fee petition on August 1, 1980 thus came nearly four years after she was last a party to the Perry case, it is arguable that her claim for a fee award against the EEOC as a co-defendant in the case is untimely. Nevertheless, in order to give her the benefit of a full consideration of her claims, the Court will consider this claim on its merits notwithstanding her dealy of almost four years in filing it with the Court.

Her contention that she was a prevailing party with respect to the EEOC as a co-defendant in the Perry case is based on the theory that the EEOC treated her as an "adversary" co-defendant, that an EEOC official exhibited hostility to her in his testimony at the hearing on Mr. Perry's motion for preliminary injunction, that the EEOC had not informed her of charges against her, and that the EEOC failed to disprove the charges against her.

The contention that the EEOC, as a co-defendant, treated her as an adversary

party in the Perry case is not substantiated by the facts. The EEOC sought no relief against her in that case by means of a cross-claim or any other procedure, nor did she file any cross-claim against the EEOC. Reduced to the essentials, her contention rests on the theory that the EEOC hoped plaintiff Perry would prevail in his lawsuit and in effect "took a dive", thus forcing her to assume the defense of that lawsuit until November 23, 1976 when she was dismissed as a party defendant. The contention is entirely without merit, because the EEOC in fact vigorously defended the Perry case.

The remaining contentions she asserts on this subject arise from the testimony of the plaintiff's then supervisor (EEOC Regional Director Donald Hollowell) at the preliminary injunction hearing in 1975 in the Perry case. Briefly summarized, Mr. Hollowell's testimony (elicited on cross-examination by Mr. Perry's attorney) was that an investigation had been conducted under his supervision relative to certain alleged actions on the part of Ms. Falkowski in the performance of the BIDO Director job, that he had reached certain conclusions from the investigation, and that he accordingly suspended her authority. The purpose for which this testimony was elicited

by Mr. Perry's attorney was not to attack Ms. Falkowski's actions but rather to show there was a basis for protests made by Mr. Perry, which in turn were alleged to have resulted in retaliation against him for "rocking the boat." Ms. Falkowski was present at the hearing (with her own attorneys) but elected not to testify in response to Regional Director Hollowell's testimony. The nub of her present contention is that the EEOC Regional Office, allegedly "dominated" by black male managers, had not wanted a white female to become BIDO Director, that EEOC counsel failed to refute the testimony of Regional Director Hollowell, and that the charges against her were "never substantiated."

There is no doubt that the evidence introduced at the preliminary injunction hearing in 1975 in the Perry case was not designed as any effort to litigate as an issue the propriety of any actions by Ms. Falkowski. Similarly, this Court's opinion on the preliminary injunction phase of the Perry case was in no way a finding of any alleged wrongdoing on the part of Ms. Falkowski. The Court's opinion so stated, and the Court has stated time and time again over the past five years that she is mistaken in viewing the Court's 1975 opinion

in the Perry case as a finding of any wrongdoing on her part.

The Court has also attempted to make clear that it appreciates Ms. Falkowski's desire to testify in response to the then Regional Director's testimony, but having elected not to testify at the time, she should not expect the Court to conduct a trial on the merits of her mooted lawsuit to give her an opportunity to give the testimony she elected not to give in the Perry case in 1975.

In any event, the reappearance of the subject in the form of her present contention that she was a prevailing party against the EEOC as a co-defendant in the Perry case is manifestly without merit for the following reasons:

First, the Court cannot accord prevailing party status to her on the basis of any idea that Regional Director Hollowell exhibited hostility to her in his testimony in 1975 in the Perry case. The Court certainly recalls nothing which would lend any credence to the idea that Mr. Hollowell's testimony exhibited hostility to Ms. Falkowski, nor has she directed the Court to anything which might support her contention. It may be assumed that she disagreed with his testimony, but the way in which any testimony in any law-

suit is to be challenged is by cross-examination or rebuttal testimony, and since she (represented by her own attorneys) did neither, she cannot expect the Court to find that Mr. Hollowell's 1975 testimony exhibited hostility to her on the basis of the vague speculation she offers.

Second, her contention that EEOC counsel at the preliminary injunction hearing in 1975 in the Perry case should have refuted Mr. Hollowell's testimony is illogical. The facts are that Mr. Hollowell was the EEOC Regional Director and was present at the hearing both as a defendant and as a witness for the EEOC, and the plaintiff has articulated no trace of any logical reason that the EEOC should have attempted to contradict the testimony of its Regional Director. The obvious fact of the matter is that she later came to regret her decision not to testify in 1975 and is now trying to place the blame on EEOC counsel for not having undertaken to do what she had the opportunity to do but elected not to do. Similarly, her contention that "the charges against her were never substantiated" is simply a repitition of her argument that the EEOC should have "refuted" the testimony of its Regional Director.

It should further be noted, for a complete understanding of the subject, that while the decision she made not to take the witness stand at the 1975 hearing in the Perry case may appear to her by hindsight to have been a mistake, there was a sound tactical reason for her then attorneys to advise her not to testify. At the time, she had pending before Judge Pointer the pleading alleging that her reassignment constituted a violation of the consent decree in her 1973 lawsuit, and any testimony she might have given in the Perry case in 1975 had the potential of jeopardizing the position she was taking before Judge Pointer. To have taken the witness stand at the 1975 hearing in the Perry case would have subjected her to cross-examination which might have provided the EEOC with grounds to resist the pleading she had pending before Judge Pointer. The importance of this tactical consideration is emphasized by the fact that she did not assert any objection to the EEOC's handling of the 1975 hearing in the Perry case until after the EEOC had agreed to proceed no further with her then proposed reassignment.

Third, the Court cannot treat her as a prevailing party on the theory that EEOC counsel failed to represent her as a defendant in the Perry case. It is conceivable, as a matter of speculation, that the EEOC indicated to her that Government counsel would not represent her or that she should retain her own attorney, but there is no such evidence before the Court. The Court must therefore assume she retained her own attorneys because she deemed it best from her standpoint to do so.

AMOUNT OF ATTORNEYS' FEES AND COSTS

The Court has found in the foregoing section that the plaintiff is due to be accorded prevailing party status on the ground that the filing of her lawsuit on April 19, 1976 had a causal influence in her authority being restored to her on May 3, 1976 and that, with this exception, she is not due prevailing party status. In practical effect, therefore, she is due an award of costs and fees against the EEOC for the filing of her civil action complaint.

Her attorney at that time was Margaret A. Beller, Esquire, of Washington, D. C.,[8] who has filed with the Court a listing of the following services in connection with the institution of the lawsuit:

Late March, 1976	Various consultations with client and co-counsel	12 hours
April 17, 18	Consultation w/ client and co-counsel in Birmingham, drafting of complaint	20 hours
April 19, 1976	Interrogatories to defendant Beasley	4 hours
April 19, 1976	Preparation of temporary restraining order[9]	4 hours
	Total	40 hours

The time for preparing interrogatories to a defendant (4 hours) will not be considered in computing the amount of attorneys' fee entitlement because there is neither evidence nor argument that the propounding of interrogatories to an individual defendant in the Regional Office in Atlanta might have played any causal role to any degree in the EEOC's restoration of plaintiff's authority. The time involved in the preparation of the TRO motion (4 hours) cannot be allowed since Judge Pointer denied the motion.

This leaves 32 hours, consisting of consultation and the drafting of the complaint. In evaluating the reasonableness of this time, it is necessary to recognize that the complaint did not attempt to break any novel or unique legal ground or raise any unusual issues. It was a garden-variety case, alleging that the plaintiff's employer was discriminating against her because of her sex and in retaliation for her earlier filing of a Title VII case. The Court does not believe that consultations and drafting in connection with this complaint warrant an award based on 32 hours. The Court concludes that 6 hours would be a generous allowance for the performance of these tasks in the circumstances of this case.

The plaintiff has provided the Court with no information relative to the amount of the hourly rate normally charged by Ms. Beller or sought in this proceeding for her services. On the basis of the Court's knowledge of customary fees and the attorney's work product, an hourly rate of $75 will be used for Ms. Beller's services in connection with the institution of the lawsuit, giving a lodestar figure of $450 (6 hours at $75 per hour). There is no contention by plaintiff that the

fee to be awarded should receive any upward adjustment on the basis of any of the non-lodestar factors set forth in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974). By the same token, there is no contention by the EEOC that the figure should be revised downward. The Court has considered the matter in light of the non-lodestar factors, as well as the fact that all of plaintiff's attorneys have practiced for more than 10 years and concludes that no factor calls for either upward adjustment or downward adjustment. The Court finds that the lodestar figure of $450 is a reasonable amount to be awarded for the services of the plaintiff's then attorney in connection with the institution of the lawsuit.

No expenses or costs are claimed by the plaintiff in connection with the institution of the lawsuit. Nevertheless, in order that the Court may give the plaintiff all she could reasonably be entitled to receive, it has been determined from the Clerk's records that the plaintiff paid a filing fee of $15 and service fees in the amount of $28.96, and the Court will grant those amounts to her as costs in connection with the filing of the lawsuit.